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"Were there no injustice, men would never have known the name of justice." Heraclitus.

OUT of the long train of injustices committed by a conquering race there has developed the concern for justice that is so overwhelming a part of Indian character today.

Those who would like to see Indians earning a living as happy American farmers are distressed that so many Indians should indulge in endless discussions about broken treaties or constitutional rights at a time when the application of equivalent energies to crops and livestock would bring larger productive returns. Some philanthropic souls are distressed to note that when an Indian receives a few dollars from the government he does not always accept the money humbly or shame-facedly, as a white man might accept a Salvation Army Thanksgiving basket, but often takes greater pride in winning a small sum from the United States Government than he would take in earning a larger sum by growing potatoes. Perhaps those who take this attitude towards the Indian fail to see how much of human dignity, in Indian eyes, may turn upon the willingness to stand up for one's rights, without regard to economic cost or gain. But whether one sympathizes with this aspect of contemporary Indian culture or dismisses it as uneconomic and neurotic, he cannot help recognizing the fact that Indians are deeply concerned with the maintenance of justice and the defense of their legal rights.

The train of injustices which the Indian has suffered has again and again led Indian champions of Indian rights to go before the federal courts to challenge as unlawful particular acts of oppression by federal and state officials as well as by private

†This article represents only my views, was written prior to my appointment as Chief of the Indian Law Survey of the Department of Justice and is in no way an expression of Departmental opinion. F. S. C.

individuals. In these cases, the Indian has often had the assistance of the most able counsel of other races. In the judicial decisions that have come down as a result of these challenges, one finds what is probably the most vigorous defense of the rights of a racial minority that exists within our jurisprudence. Those who have criticised the decisions of federal courts in other fields as lacking in a proper respect for the rights of oppressed groups in society never have directed that criticism at federal decisions on Indian questions. Unfortunately, however, the role of the federal judiciary, as a protector of Indian rights, has never yet been adequately recorded.[1]

It should be clear at the outset that Indians are citizens of the United States,[2] entitled to all the rights which non-Indians may claim under general laws and constitutions. If an Indian is accused of counterfeiting he is entitled to a jury trial, just as any other citizen would be. There is no special Indian question involved in the case. The fact that one of the parties in a case is an Indian does not raise a question of Indian rights. In this paper, therefore, we shall not attempt to treat the rights which Indians share with all their fellow citizens, such as the right of free speech, the right of jury trial for federal offenses, and the right to be immune from slavery. We shall consider only those rights that have a special relation to the position of the Indian in American law. These rights are of three sorts:

1. *The Right of Self-Government.* Indians who are members of an existing tribe have a special political relationship to each other, out of which the right of self-government may emerge. The extent of this right will be the first object of our inquiry.

2. *Civil Liberties of Indians.* Indians have been given a peculiar position under various statutes and administrative practices intended for their protection, civilization or eradication, and the question therefore arises: "What rights may the Indians in-

[1]Three excellent articles on the law governing Indian affairs deal briefly with certain aspects of Indian rights: Rice, The Position of the American Indian in the Law of the United States, (1934) 16 J. Comp. Leg. (3rd ser.) pt. 1, p. 78; Brown, The Indian Problem and the Law, (1930) 39 Yale L. J. 307; Pound, Nationals without a Nation, (1922) 22 Col. L. Rev. 97.

The standard compilation of laws and treaties governing Indian affairs is Kappler, Indian Affairs: Laws and Treaties (2d ed. 1904) vols. 1-4.

[2]"All Indians born within the territorial limits of the United States are declared to be citizens of the United States. The granting of citizenship to Indians shall not in any manner affect the right of any Indian to tribal or other property." (Act of June 2, 1924; 43 Stat. at L. 253, U. S. C., Title 8, sec. 3, 8 U. S. C. A. sec. 3.)

voke to protect themselves against oppression under such special statutes and practices?"

3. *Property Rights of Indians.* Indian property is very largely property over which the federal government exercises a special control. The question thus arises: "What rights does the Indian have with respect to Indian property?"

It will be the purpose of this paper to chart the content of these Indian rights, with particular reference to the governing decisions of the Supreme Court and the lower federal courts.

1. The Right of Self-Government

". . . among the arts of civilized life . . . was the highest and best of all, that self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs."[3]

The Indian's right of self-government is a right which has been honored by essay writers, consistently protected by the courts, grudgingly recognized and intermittently ignored by legislators, and systematically undermined by administrative officials. The most basic of all Indian rights, it is the Indian's last defense against bureaucratic oppression, for in a realm where the states are powerless to govern and where Congress, occupied with more pressing national affairs, cannot govern wisely and well, there remains a large no-man's-land in which government can emanate only from officials of the Interior Department or from the Indians themselves. Self-government is thus the Indians' only alternative to rule by a government department.

Indian self-government, the decided cases hold, includes the power of an Indian tribe to adopt and operate under a form of government of the Indians' choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice.[4]

The right of self-government is not something granted to the Indians by any act of Congress. It is rather an inherent and original right of the Indian tribes, recognized by courts and legislators, a right of which the Indian tribes never have been deprived. The analysis of this right, therefore, takes us back to the first

[3]From the opinion of the Supreme Court in Ex parte Crow Dog, (1883) 109 U. S. 556, 568, 3 Sup. Ct. 396, 27 L. Ed. 1030.

[4]Powers of Indian Tribes, (1934) 55 I. D. 14, 65-67.

governmental contacts between the federal government and our Indian tribes.

The nature of these contacts is set forth with lucidity in the classic opinion of Chief Justice Marshall in the case of *Worcester v. Georgia,*[5] from which the following excerpts are taken:

"America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other, and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either, by the other, should give the discoverer rights in the country discovered, which annulled the pre-existing right of its ancient possessors. . . .[6]

"But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. . . .[7]

"To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, 'that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession' (8 Wheat. 573). This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle, which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. . . . The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt so far as is known, has been made to enlarge them."[8]

"The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the

[5](1832) 6 Pet. (U.S.) 515, 8 L. Ed. 483.
[6]P. 541.
[7]P. 543.
[8]P. 543.

Indians. The very term 'nation,' so generally applied to them, means 'a people distinct from others.'[9]

". . . the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority, are left in the administration of the state.' At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.

"The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress."[10]

John Marshall's analysis of the basis of Indian self-government in the law of nations has been followed consistently by the courts for more than a hundred years. The doctrine set forth in this opinion has been applied to an unfolding series of new problems in scores of cases that have come before the Supreme Court and the inferior federal courts. The doctrine has not always been so highly respected in state courts and by administrative authorities. It was of the decision in *Worcester v. Georgia* that President Jackson is reported to have said, "John Marshall has made his decision; now let him enforce it."[11] As a matter of history, the state of Georgia, unsuccessful defendant in the case, never did carry out the Supreme Court's decision, and the "successful" plaintiff, a guest of the Cherokee nation, continued to languish in a Georgia prison, under a Georgia law which, according to the Supreme Court decision, was unconstitutional.

The case in which the doctrine of Indian self-government was first established has a certain prophetic character. Administrative officials for a century afterwards continued to ignore the broad implications of the judicial doctrine of Indian self-government. But again and again, as cases came before the federal courts, administrative officials, state and federal, were forced to reckon

[9] P. 559.
[10] P. 560.
[11] 1 Greeley, American Conflict, 106.

with the doctrine of Indian self-government and to surrender powers of Indian tribes which they sought to usurp. Finally, after 101 years, there appeared an administration that accepted the logical implications of Indian self-government.[12]

During the 101 years following the Supreme Court's decision in *Worcester v. Georgia* the right of Indian self-government was tested in ten major cases.[13] These cases constitute the skeleton of the federal law governing Indian tribes.

1. *Tribal Authority Over Crimes.* The first major test of the principle of Indian self-government following the decision in *Worcester v. Georgia* arose in the case, *Ex parte Crow Dog.*[14] Crow Dog was a famous Sioux warrior who found occasion to slay his fellow-tribesman Spotted Tail. The murder excited nation-wide interest. Crow Dog was tried in a federal court, found guilty of murder and condemned to death. His attorney sued out a writ of habeas corpus in the Supreme Court, claiming that his client was not amenable to the criminal laws of the United States or of the Dakota Territory, but was governed in his relations with other Indians on reservations purely by tribal law and

[12]The most comprehensive piece of Indian legislation since the Acts of June 30, 1834, (4 Stat. at L. 729, 735) is the Act of June 18, 1934, (48 Stat. at L. 984; U.S. C., Title 25, sec. 461-479, 25 U.S.C.A. secs. 461-479), entitled "An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes," and commonly known as the Wheeler-Howard Act or Indian Reorganization Act. Since its enactment, this statute has been amended in minor particulars (Act of June 15, 1935, 49 Stat. at L. 378, U.S. C., Title 25, secs. 478a, 478b; Act of August 12, 1935, sec. 2, 49 Stat. at L. 596, U.S. C., Title 25, sec. 475a; Act of August 28, 1937, 50 Stat. at L. 862, U.S. C., Title 25, secs. 463-463c), and its more important provisions have been extended to Alaska (Act of May 1, 1936, 49 Stat. at L. 1250, U.S. C., Title 48, sec. 362) and Oklahoma (Act of June 26, 1936, 49 Stat. at L. 1967, U.S. C., Title 25, secs. 501-509).

[13]Ex parte Crow Dog, (1883) 109 U. S. 556, 3 Sup. Ct. 396, 27 L. Ed. 1030; Standley v. Roberts, (C.C.A. 8th Cir. 1894) 59 Fed. 836, app. dis. (1896) 17 Sup. Ct. 999, 41 L. Ed. 1177; Talton v. Mayes, (1896) 163 U. S. 376, 16 Sup. Ct. 986, 41 L. Ed. 196; Waldron v. United States, (C.C. S.D. 1905) 143 Fed. 413; Jones v. Meehan, (1899) 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49; Buster v. Wright, (C.C.A. 8th Cir. 1905) 135 Fed. 947, app. dis., (1906) 203 U. S. 599, 27 Sup. Ct. 777, 51 L. Ed. 334; Cherokee Nation v. Journeycake, (1894) 155 U. S. 196, 15 Sup. Ct. 55, 39 L. Ed. 120; United States v. Quiver, (1916) 241 U. S. 602, 36 Sup. Ct. 699, 60 L. Ed. 1196; Turner v. United States and Creek Nation, 51 Ct. Cls. 125 (aff'd (1919) 248 U.S. 354, 39 Sup. Ct. 109, 63 L. Ed. 291); Pueblo of Santa Rosa v. Fall, (1927) 273 U. S. 315, 47 Sup. Ct. 361, 71 L. Ed. 658.

[14](1883) 109 U. S. 556, 3 Sup. Ct. 396, 27 L. Ed. 1030.

was responsible only to tribal authorities. This contention was sustained by the Supreme Court in a unanimous opinion.[15]

In the *Crow Dog Case* the government argued that federal criminal jurisdiction was established by the force of a treaty with the Sioux Nation containing the following clause:

"And Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life."[16]

Answering this argument, the Supreme Court declared, *per* Matthews, J.:

"It is equally clear, in our opinion, that these words can have no such effect as that claimed for them. The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs."[17]

The case of *Crow Dog* did not deny the power of Congress to legislate over Indian affairs and to curtail, if it saw fit, the scope of Indian self-government. It simply pointed to the fact that Congress never had legislated in this field. Federal criminal statutes governing places "within the sole and exclusive jurisdiction of the United States" had been extended to the Indian country[18] but subject to the specific limitation that they should not

"be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any

[15]To the same effect see (1883) 17 Op. Att. Gen. 566, 570, in which an Indian of Tribe A murdered an Indian of Tribe B on the reservation of Tribe C. The attorney general declared: "If no demand for Foster's surrender shall be made by one or other of the tribes, founded fairly upon a violation of some law of one or other of them having jurisdiction of the offense in question according to general principles, and forms substantially conformable to natural justice, it seems that nothing remains except to discharge him." See, to the same effect, State v. McKenney, (1883) 18 Nev. 182. See also Report Judiciary Committee declaring: "Their right to self-government, and to administer justice among themselves, after their rude fashion, even to inflicting the death penalty, has never been questioned." Sen. Rep. No. 268, 41st Cong., 3rd Sess.

[16]At p. 568.

[17]At pp. 568-569.

[18]Act of June 30, 1834, sec. 25, 4 Stat. at L. 733; amended by Act of March 27, 1854, sec. 3, 10 Stat. at L. 270; U. S. C., Title 25, sec. 217, 25 U. S. C. A. sec. 217.

Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."[19]

So much consternation was created by the Supreme Court's decision in *Ex parte Crow Dog* that within two years Congress had enacted a law making it a federal crime for one Indian to murder another Indian on an Indian reservation.[20] This law also prohibited manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. In later years notorious cases of robbery, incest, and assault with a dangerous weapon resulted in the piecemeal addition of these three offenses to the federal code of Indian crimes.[21] There are thus, at the present time, ten major offenses for which federal jurisdiction has displaced tribal jurisdiction. Federal courts also have jurisdiction over the ordinary federal crimes applicable throughout the United States (such as counterfeiting, smuggling,[22] and offenses relative to the mails), over violations of special laws for the protection of Indians,[23] and over offenses committed by an Indian against a non-Indian or by a non-Indian against an Indian which fall within the special code of offenses for territory "within the exclusive jurisdiction of the United States."[24] All offenses other than these remain subject to tribal law and custom and to tribal courts.

It is important to remember that although Indians are citizens of the states in which they reside, they are immune from state con-

[19]Act of June 30, 1834, sec. 25, 4 Stat. at L. 733; amended by Act of March 27, 1854, sec. 3, 10 Stat. at L. 270; U. S. C., Title 25, sec. 218, 25 U. S. C. A. sec. 218.

[20]Act of March 3, 1885, 23 Stat. at L. 385, U. S. C., Title 18, sec. 548, 18 U. S. C. A. sec. 548.

[21]Act of March 4, 1909, sec. 328, 35 Stat. at L. 1151; Act of June 28, 1932, 47 Stat. at L. 337.

[22]See Bailey v. United States, (C.C.A. 9th Cir. 1931) 47 F. (2d) 702, confirming conviction of tribal Indian for offense of smuggling.

[23]See U. S. Code, Title 18, secs. 104 (timber depredations on Indian lands), 107 (starting fires on Indian lands); 110 (breaking fences or driving cattle on inclosed public lands); 115 (inducing conveyances by Indians of trust interests in lands); U. S. Code, Title 25, sec. 83 (receipt of money under prohibited contracts); 177 (purchases or grants of land from Indians); 179 (driving stock to feed on Indian lands); 180 (settling on or surveying lands belonging to Indians by treaty); 195 (sale of cattle purchased by government to nontribal members); 212 (arson); 213 (assault with intent to kill); 214 (disposing or removing cattle); 216 (hunting on Indian lands); 241 (intoxicating liquors: sale to Indians or introducing into Indian country); 241a (sale, etc. of liquors in former Indian territory); 244 (possession of intoxicating liquors in Indian country); 251 (setting up distillery); 264 (trading without license); 265 (prohibited purchases and sales); 266 (sale of arms).

[24]See U. S. C., Title 18, chaps. 11 and 13, 18 U. S. C. A. chs. 11, 13.

trol for actions within their own reservations.[25] An Indian who is "off the reservation" is subject to the criminal laws of the state, like any other citizen,[26] but within the reservation he is subject only to federal and tribal jurisdiction. As was said in the case of *United States v. Boylan*,[27] which rejected a claim by courts of the State of New York to jurisdiction over certain Indians for acts committed on an Indian reservation, ". . . even a grant of citizenship does not terminate the tribal status or relieve the Indian from the guardianship of the government."[28]

The actual exercise of jurisdiction over criminal cases by tribal courts and tribal councils has frequently been hampered by the interference of Indian Bureau officials who disapproved of the "uncivilized" practices of the Indians and sought to substitute a "civilized" system of "courts of Indian offenses" in which the superintendent of the reservation claimed the right to act as law-maker, chief of police, prosecutor, witness, and court of appeal.[29] This allegedly "civilized" system of justice was in force on a number of reservations from 1884 until 1935,[30] when it was superseded by a more liberal system which made the so-called Courts of Indian Offenses responsible to the Indian tribes and terminated the reservation superintendent's power to control proceedings in these courts. A number of tribes, notably the Pueblos of the Southwest, the Indians of New York, and, until the turn of the century, the various tribes located in Indian Territory, never did

[25]Worcester v. Georgia, (1832) 6 Pet. (U.S.) 515, 8 L. Ed. 483; United States v. Kagama, (1886) 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228; United States v. Thomas, (1894) 151 U. S. 577, 14 Sup. Ct. 426, 38 L. Ed. 276; Toy v. Hopkins, (1909) 212 U. S. 542, 29 Sup. Ct. 416, 53 L. Ed. 644; United States v. Celestine, (1909) 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195; Donnelly v. United States, (1913) 228 U. S. 243, 33 Sup. Ct. 449, 27 L. Ed. 820; United States v. Pelican, (1914) 232 U. S. 442, 34 Sup. Ct. 396, 58 L. Ed. 676; United States v. Ramsey, (1926) 271 U. S. 467, 46 Sup. Ct. 559, 70 L. Ed. 1039; United States v. King, (E.D. Wis. 1897) 81 Fed. 625; In re Lincoln (N.D. Cal. 1904) 129 Fed. 247; United States v. Hamilton, (W.D. N.Y. 1915) 233 Fed. 685; Yohyowan v. Luce, (E.D. Wash., 1923) 291 Fed. 425; State v. Campbell, (1893) 53 Minn. 354, 55 N. W. 553; State v. Big Sheep, (1926) 75 Mont. 219, 243 Pac. 1067; Ex parte Cross, (1886) 20 Neb. 417, 30 N. W. 428; People ex rel. Cusick v. Daly, (1914) 212 N. Y. 183, 105 N. E. 1048; State v. Cloud, (1930) 179 Minn. 180, 228 N. W. 611; State v. Rufus, (1931) 205 Wis. 317, 237 N. W. 67.

[26]See Pablo v. People, (1896) 23 Colo. 134, 46 Pac. 636.

[27](C.C.A. 8th Cir. 1920) 265 Fed. 165.

[28]See, to the same effect, Farrell v. United States, (C.C.A. 8th Cir. 1901) 110 Fed. 942; United States v. Nice, (1916) 241 U. S. 591, 36 Sup. Ct. 696, 60 L. Ed. 1192.

[29]Regulations of the Indian Office (1904) secs. 584-591.

[30]Law and Order Regulations of the Indian Service, November 27, 1935, 55 I. D. 401.

permit any encroachment by the federal authorities in the local administration of justice, and enforced the criminal laws of the tribe, written or unwritten, with an efficiency that has evoked a good deal of admiration from impartial observers.

An opinion of the solicitor of the Interior Department rendered in 1934[31] sums up the powers of an Indian tribe in the administration of law and order in the following terms:

"So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish the subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. Similarly, it might punish aliens within its jurisdiction according to its own laws and customs. Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government.[32]

"Recognition of tribal authority in the administration of justice is found in the statutes of Congress, as well as in the decisions of the federal courts.

"U. S. Code, Title 25, section 229, provides that redress for a civil injury committed by an Indian shall be sought in the first instance from the 'Nation or tribe to which such Indian shall belong.' This provision for collective responsibility evidently assumes that the Indian tribe or Nation has its own resources for exercising disciplinary power over individual wrongdoers within the community.

"We have already referred to U. S. Code, Title 25, section 218, with its express assurance that persons 'punished by the law of the tribe' shall not be tried again before the federal courts.

"What is even more important than these statutory recognitions of tribal criminal authority is the persistent silence of Congress on the general problem of Indian criminal jurisdiction. There is nothing to justify an alternative to the conclusion that the Indian tribes retain sovereignty and jurisdiction over a vast area of ordinary offenses over which the federal government has never presumed to legislate and over which the state governments have not the authority to legislate.

"The attempts of the Interior Department to administer a rough-and-ready sort of justice through Courts of Indian Offenses, or directly through superintendents, cannot be held to have impaired tribal authority in the field of law and order. These agencies have been characterized, in the only reported case squarely upholding their legality, as 'mere educational and disciplinary instrumentalities by which the government of the United States is

[31]"Powers of Indian Tribes" (October 25, 1934) 55 I. D. 14.

[32]At p. 57.

endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian.' (*United States v. Clapox*, 35 Fed. 575; and cf. *Ex parte Bi-a-lil-le*, 12 Ariz. 150, 100 Pac. 450; *United States v. Van Wert*, 195 Fed. 974). Perhaps a more satisfactory defense of their legality is the doctrine put forward by a recent writer that the Courts of Indian Offenses 'derive their authority from the tribe, rather than from Washington.'[33]

"Whichever of these explanations be offered for the existence of the Courts of Indian Offenses, their establishment cannot be held to have destroyed or limited the powers vested by existing law in the Indian tribes over the province of law and order and the administration of civil and criminal justice."[34]

It remains to add that today the administration of law and order is being taken over as a local responsibility by most of the tribes that, since the enactment of the Wheeler-Howard Act of June 18, 1934, have adopted constitutions for self-government.[35] The scope of the law and order problem which these tribes face is measured by the lacunae of federal law. There is no federal law to deal with simple assault committed by one Indian against another on an Indian reservation, or with adultery, seduction, bigamy, kidnapping, receiving stolen goods, obtaining money under false pretenses, embezzlement, blackmail, libel, forgery, fraud, trespass, mayhem, bribery, killing of another's livestock, setting fire to grass or timber, use of false weights and measures, pollution of water supplies or disorderly conduct. The list is by no means complete. An Indian reservation would be a criminal's paradise were it not for the preventive and punitive measures of the tribe itself.

The penal codes thus far adopted by tribes which have organized under the Act of June 18, 1934, generally differ from comparable state penal codes in the following respects:

1—The number of offenses specified in a tribal code generally runs between 40 and 50, whereas a state code (exclusive of local municipal ordinances) generally specifies between 800 and 2,000 offenses.[36]

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[33]Rice, The Position of the American Indian in the Law of the United States, (1934) 16 J. Comp. Leg. (3d Ser.), Part 1, p. 78, 93.

[34]At pp. 62, 64.

[35]See, for example, Code of Ordinances of the Gila River Pima-Maricopa Indian Community, adopted June 3, 1936, and approved by the secretary of the interior on August 24, 1936; Rosebud Code of Offenses, adopted April 8, 1937, and approved by the secretary of the interior July 7, 1937.

[36]The Penal Code of New York State (39 McKinney's Cons. Laws of N.Y., 1936 supp.) lists fifty-four offenses under the letter "A". The Penal

2—The maximum punishment specified in the Indian penal codes is generally more humane, seldom exceeding imprisonment for six months, even for offenses like kidnapping, for which state penal codes impose imprisonment for twenty years or more, or death.

3—Except for fixing a maximum penalty, the Indian penal codes leave a large discretion to the court in adjusting the penalty to the circumstances of the offense and the offender.

4—The form of punishment is, typically, forced labor for the benefit of the tribe or of the victim of the offense, rather than imprisonment.

5—The tribal penal codes, for the most part, do not contain the usual catch-all provisions to be found in state penal codes (vagrancy, conspiracy, criminal syndicalism, etc.), under which almost any unpopular individual may be convicted of crime.

6—The tribal penal code is generally put into the hands of every member of the tribe, and widely read and discussed, which is not the case with state penal codes.

The comparison suggests that perhaps the Indian penal codes may be more "civilized" than the non-Indian.

2. *The Civil Jurisdiction of an Indian Tribe.* The doctrine of Indian tribal sovereignty was tested and confirmed in the field of civil litigation in the case of *Standley v. Roberts.*[37] The question arose in this case whether a federal court might, by injunction, restrain the enforcement of a judgment rendered by the circuit court of the Choctaw Nation and confirmed by the Supreme Court of the Choctaw Nation, affecting title to land and rights to rentals within the Choctaw Nation. This issue was resolved in favor of the Choctaw Nation by the circuit court of appeals, and the decision was sustained by the Supreme Court. In the opinion of the former court, rendered by Judge Sanborn, it was said:

". . . the judgments of the courts of those nations, in cases within their jurisdiction, stand on the same footing with those of the courts of the territories of the Union and are entitled to the same faith and credit."[38]

Commenting on the scope of tribal civil jurisdiction, an eminent authority in this field writes:

"This gives to many Indian tribes a large measure of con-

Code of Montana (Montana, Rev. Codes 1921) contains 871 sections defining crimes.

[37]See (C.C.A. 8th Cir. 1894) 59 Fed. 836, app. dismissed, (1896) 17 Sup. Ct. 999, 41 L. Ed. 1177.

[38](C.C.A. 8th Cir. 1894) 59 Fed. 836, 845.

tinuing autonomy, for the federal statutes are only a fragment of law, principally providing some educational, hygienic and economic assistance, regulating land ownership, and punishing certain crimes committed by or upon Indians on a reservation. Where these statutes do not reach, Indian custom is the only law. As a matter of convenience, the regular courts (white men's courts) tacitly assume that the general law of the community is the law in civil cases between Indians, but these courts will apply Indian custom where it is proved."[39]

Application of tribal law to questions of contract and property rights as well as to personal relations, has been sustained consistently by the federal courts.[40]

In view of a fairly prevalent notion that the conferring of United States citizenship upon Indians loosens the force of tribal laws, it is well to point out that the only legal authority for this view to be found in the federal cases—the decision of the Supreme Court in *In re Heff*[41]—has since been explicitly repudiated.[42] The fallacy of the argument that citizenship is incompatible with tribal jurisdiction is exposed in an opinion of the attorney general,[43] holding that the Choctaw courts had complete jurisdiction over a civil controversy between a Choctaw Indian and an adopted white man. The opinion states:

"On the other hand, it is argued by the United States Agent, that the courts of the Choctaws can have no jurisdiction of any case in which a citizen of the United States is a party. . . .

"In the first place, it is certain that the Agent errs in assuming the legal impossibility of a citizen of the United States becoming subject, in civil matters, or criminal either, to the juridiction of the Choctaws. It is true that no citizen of the United States can, while he remains within the United States, escape their constitutional jurisdiction, either by adoption into a tribe of Indians, or in any other way. But the error in all this consists in the idea that any man, citizen or not citizen, becomes divested of his allegiance to the United States, or throws off their jurisdiction or government, in the fact of becoming subject to any

[39]Rice, The Position of the American Indian in the Law of the United States, (1934) 16 J. Comp. Leg. (3d series), part 1, at p. 90.

[40]Crabtree v. Madden, (C.C.A. 8th Cir. 1893) 54 Fed. 426; Jones v. Laney, (1847) 2 Tex. 342, 21 S. W. 297: Delaware Indians v. Cherokee Nation, (1903) 38 Ct. of Cl. 234, decree modified (1904) 193 U. S. 127, 24 Sup. Ct. 342, 48 L. Ed. 646; Myers v. Mathis (1898) 2 Ind. T. 3, 46 S. W. 178; James H. Hamilton v. United States, (1907) 42 Ct. of Cl. 282; Zevely v. Weimer, (1904) 5 Ind. T. 646, 82 S. W. 941, and see Pound, Nationals Without a Nation, (1922) 22 Col. L. Rev. 97, 101-102.

[41](1905) 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848.

[42]See United States v. Nice, (1916) 241 U. S. 591, 601, 36 Sup. Ct. 696, 60 L. Ed. 1192.

[43](1855) 7 Op. Att. Gen. 176.

local jurisdiction whatever. This idea misconceives entirely the whole theory of the federal government, which theory is, that all the inhabitants of the country are, in regard to certain limited matters, subject to the federal jurisdiction, and in all others to the local jurisdiction, whether political or municipal. The citizen of Mississippi is also a citizen of the United States; and he owes allegiance to, and is subject to the laws of, both governments. So also an Indian, whether he be Choctaw or Chickasaw, and while subject to the local jurisdiction of the councils and courts of the Nation, yet is not in any possible relation or sense divested of his allegiance and obligations to the Government and laws of the United States."

3. *The Indian Tribes and the Federal Constitution.* The doctrine of tribal autonomy first enunciated by Chief Justice Marshall was put to a decisive test in the case of *Talton v. Mayes.*[44] Under the legal doctrine of tribal autonomy, the powers of an Indian tribe, not being derived from treaties of the United States nor from statutes enacted by Congress, are not subject to the limitations which the United States Constitution imposes upon the federal government. It follows that Indian courts and legislatures may proceed without reference to the many restrictions of substance and procedure which the federal courts have discovered in the due process clause of the fifth amendment, for it has long been held that this clause applies only to agencies of the United States and does not give any specific protection against oppressive acts of states, municipalities, mobs, private corporations, religious orders, or voluntary associations.[45]

The case of *Talton v. Mayes* turned on the question whether the conviction of a murderer in a tribal court was lacking in "due process" for the reason that the person convicted had not been indicted by a grand jury in the usual manner of common law courts. The opinion of the Supreme Court delivered by Mr. Justice (afterwards Chief Justice) White, met the question squarely:

"The case in this regard therefore depends upon whether the powers of local government exercised by the Cherokee nation are federal powers created by and springing from the Constitution of the United States, and hence controlled by the fifth amendment to that constitution, or whether they are local powers not created by the constitution, although subject to its general provisions and the paramount authority of Congress. The repeated adjudications of

[44](1896) 163 U. S. 376, 16 Sup. Ct. 986, 41 L. Ed. 196.

[45]See United States v. Wheeler, (1920) 254 U. S. 281, 41 Sup. Ct. 133, 65 L. Ed. 270, and cases therein cited.

this court have long since answered the former question in the negative."[46]

After quoting from Marshall's opinion in *Worcester v. Georgia,* and other authorities, the Court declared:

"True it is that in many adjudications of this court the fact has been fully recognized, that although possessed of these attributes of local self government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States. *Cherokee Nation v. Kansas Railway Co.,* 135 U. S. 641, where the cases are fully reviewed. But the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers federal powers arising from and created by the constitution of the United States. It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the constitution, they are not operated upon by the fifth amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the national government."[47]

The decision in *Talton v. Mayes* does not mean that Indian tribes are not subject to the constitution of the United States. It remains true that an Indian tribe is subject to the federal constitution in the same sense that the City of New Orleans, for instance, is subject to the federal constitution. The federal constitution prohibits slavery absolutely. This absolute prohibition applies to an Indian tribe as well as to a municipal government, and it has been held that slave-holding within an Indian tribe became illegal with the passage of the thirteenth amendment.[48] It is, therefore, always pertinent to ask whether an ordinance of a tribe conflicts with the constitution of the United States.[49] Where, however, the United States constitution levies particular restraints upon federal courts or upon Congress, these restraints do not apply to the courts or legislatures of the Indian tribes. Likewise, where the federal constitution lays particular restraints upon the states, these restraints are inapplicable to Indian tribes.

It has been held that the guarantee of religious liberty in the first amendment of the United States constitution does not protect a resident of New Orleans from religious oppression by municipal authorities.[50] Neither does it protect the Indian against religious

[46]At p. 382.
[47]At p. 384. See, to the same effect, Ex parte Tiger, (1898) 2 Ind. T. 41, 47 S. W. 304.
[48]In re Sah Quah, (D.C. Alaska 1886) 31 Fed. 327.
[49]Cf. Roff v. Burney, (1897) 168 U. S. 218, 18 Sup. Ct. 60, 42 L. Ed. 442.
[50]Permoli v. Municipality No. 1 of the City of New Orleans, (1845) 3 How. (U.S.) 589, 11 L. Ed. 739.

oppression on the part of tribal authorities. As the citizen of New Orleans must write guarantees of religious liberty into his city charter or his state constitution, if he desires constitutional protection in this respect, so the members of an Indian tribe must write the guarantees they desire into tribal constitutions. In fact, many tribes have written such guarantees into tribal constitutions that are now in force.[51]

4. *The Membership of an Indian Tribe.* The principle of tribal autonomy implies that questions of membership in an Indian tribe are to be determined in accordance with the laws and customs of the tribe itself, at least wherever Congress has not modified or superseded these laws and customs by special legislation. The authority of an Indian tribe to decide such questions has been challenged from several sources. On the one hand, individuals have claimed tribal membership on the basis of a supposed common law principle to the effect that the child assumes the status of the father. This claim has generally been put forward by individuals with a slight degree of Indian blood who discover that they are Indians when oil is struck in some ancestral homeland. Again the authority of tribal laws and customs has been challenged by departmental officials who felt that questions of membership in an Indian tribe should be determined by rules and regulations of the secretary of the interior.

The case of *Waldron v. United States,*[52] is perhaps the clearest of the cases in which the validity of Indian laws and customs on

[51]A typical Indian bill of rights is the following, taken from the constitution of the Blackfeet Tribe, approved Dec. 13, 1935 by the secretary of the interior, pursuant to section 16 of the Act of June 18, 1934 (48 Stat. at L. 964):

"ARTICLE VIII—BILL OF RIGHTS

"Section 1. *Suffrage.*—Any member of the Blackfeet Tribe, twenty-one (21) years of age or over, shall be eligible to vote at any election when he or she presents himself or herself at a polling place within his or her voting district.

"Section 2. *Economic rights.*—All members of the tribe shall be accorded equal opportunities to participate in the economic resources and activities of the reservation.

"Section 3. *Civil liberties.*—All members of the tribe may enjoy without hindrance freedom of worship, conscience, speech, press, assembly, and association.

"Section 4. *Rights of accused.*—Any member of the Blackfeet Tribe accused of any offense shall have the right to a bond, open and public hearing, with due notice of the offense charged, and shall be permitted to summon witnesses on his own behalf. Trial by jury may be demanded by any prisoner accused of any offense punishable by more than thirty days' imprisonment. Excessive bail shall not be required and cruel punishment shall not be imposed."

[52](C.C. S.D. 1905) 143 Fed. 413.

questions of tribal membership is considered and upheld. The plaintiff in this case, Jane Waldron, had been recognized by the Two Kettle Band of the Sioux Nation, in accordance with its laws and customs, as a member of the Band.

The secretary of the interior asked the attorney general to render an opinion on the plaintiff's status, and the attorney general held that whether the plaintiff was entitled to an allotment as an Indian depended on the laws and customs of the tribe:

"The question, therefore, whether any particular person is or is not an Indian within the meaning of this agreement is to be determined, in my opinion, not by the common law, but by the laws or usages of the tribe."[53]

The secretary of the interior, having received this opinion, like many honorable administrative officials before and since, found it to be an inconvenient limitation upon his discretion, and failed to carry it out. In disregard of the laws and usages of the Two Kettle Band of the Sioux Nation, the secretary of the interior refused an allotment to Jane Waldron, who then brought suit against the United States to secure her allotment, under the act of February 6, 1901.[54] The United States circuit court for South Dakota agreed with the attorney general as to the law, and awarded the allotment in question to the plaintiff, holding that, since she was recognized by the tribe as a member, the secretary of the interior had no authority to over-rule the tribal decision and exclude her from membership privileges. The Court went on to say:

"In this proceeding the court has been informed as to the usages and customs of the different tribes of the Sioux Nation, and has found as a fact that the common law does not obtain among said tribes, as to determining the race to which the children of a white man, married to an Indian woman, belong; but, that, according to the usages and customs of said tribes, the children of a white man, married to an Indian woman, take the race or nationality of the mother."[55]

This doctrine is confirmed by a series of Supreme Court decisions on tribal membership in which reference is had to the law,

[53](1894) 20 Op. Atty. Gen. 711, 712. To the same effect see: United States v. Heyfron, (two cases), (C.C. Mont. 1905) 138 Fed. 964, 968; Western Cherokee Indians v. United States, (1891) 27 Ct. Cl. 1; (1888) 19 Op. Atty. Gen. 109.

[54]31 St. at L. 760; U. S. C., Title 25, secs. 345-346, 25 U. S. C. A. secs. 345-46.

[55]At p. 419.

customs, and decisions of the Indian tribe in determining the right of an individual to membership in the tribe.[56]

Indeed, the federal cases go so far in the recognition of tribal autonomy as to hold that the federal courts themselves may be ousted of jurisdiction where tribal law provides that an intermarried white becomes a member of the tribe and subject to the jurisdiction of the tribe. In the case of *Raymond v. Raymond,*[57] the court, following the authority of *Nofire v. United States,* above cited, upheld the jurisdiction of a tribal court over a divorce action, declaring:

"It is conceded that under the laws of that nation the appellee became a member of that tribe, by adoption, through her intermarriage with the appellant. It is settled by the decisions of the supreme court that her adoption into that nation ousted the federal court of jurisdiction over any suit between her and any member of that tribe, and vested the tribal courts with exclusive jurisdiction over every such action."[58]

Probably the most carefully reasoned opinion on the right of an Indian tribe to determine questions of tribal membership is the opinion of the New York court of appeals in the case of *Patterson v. Council of Seneca Nation.*[59] This was a case where the plaintiff sought by mandamus to compel the Council of the Seneca Nation to recognize him as a member of that Nation. The court of appeals, after a careful examination of the authorities, held that mandamus would not lie for the reason that the authority of the Seneca Council was not derived from legislation of the state or nation but antedated both and was beyond interference from state courts. In reaching this conclusion, the Court, referring to the opinion of Chief Justice Marshall in *Worcester v. Georgia,* declared, per Kellogg, J.:

"Unless these expressions as well as similar expressions many times used by many courts in various jurisdictions, are mere words of flattery designed to soothe Indian sensibilities, unless the last vestige of separate national life has been withdrawn from the Indian tribes by encroaching state legislation, then, surely, it must follow that the Seneca Nation of Indians has retained for itself that prerequisite to their self-preservation and integrity as a nation, the right to determine by whom its membership shall be constituted."[60]

[56]Nofire v. United States, (1897) 164 U. S. 647, 17 Sup. Ct. 212, 41 L. Ed. 588; Hy-yu-tse-mil-kin v. Smith, (1904) 194 U. S. 401, 24 Sup. Ct. 676, 48 L. Ed. 1039; Cherokee Intermarriage Cases, (1906) 203 U. S. 76, 27 Sup. Ct. 29, 51 L. Ed. 96.

[57](C.C.A. 8th Cir. 1897) 83 Fed. 721.

[58]At p. 723.

[59](1927) 245 N. Y. 433, 157 N. E. 734.

[60]At p. 438.

"It must be the law, therefore, that, unless the Seneca Nation of Indians and the state of New York enjoy a relation inter se peculiar to themselves, the right to enrollment of the petitioner, with its attending property rights, depends upon the laws and usages of the Seneca Nation and is to be determined by that Nation for itself without interference or dictation from the supreme court of the state."[61]

"The conclusion is inescapable that the Seneca Tribe remains a separate nation; that its powers of self-government are retained with the sanction of the state; that the ancient customs and usages of the nation except in a few particulars, remain, unabolished, the law of the Indian land; that in its capacity of a sovereign nation the Seneca Nation is not subservient to the orders and directions of the courts of New York state; that, above all, the Seneca Nation retains for itself the power of determining who are Senecas, and in that respect is above interference and dictation."[62]

The general power of an Indian tribe to determine its own membership is limited only by Congressional enactments which grant property rights associated with tribal membership to specified classes of individuals[63] or which empower the secretary of the interior to establish final rolls for designated tribes.

Such statutes, generally speaking, do not destroy the power of the tribe to determine its own membership, although they take from that power some of its pecuniary importance by allowing persons whom the tribe does not recognize as members to receive shares of tribal property and by allowing the secretary of the interior to deny a share of such property to others whom the tribe does recognize. This latter issue was presented to the Supreme Court in the case of *United States ex rel. West v. Hitchcock*,[64] where the secretary of the interior refused an allotment to an individual who claimed to have been adopted by the tribe. The secretary was upheld, and the Court declared, per Holmes, J.:

"If the secretary had authority to pass on the relator's right to select land, his jurisdiction did not depend upon his decision being right."[65]

Dicta in this case suggest that the action of the tribe in

[61]At p. 440.

[62]At p. 445.

[63]See Act of June 7, 1897, 30 Stat. at L. 90, U. S. C., Title 25, sec. 184, 25 U. S. C. A. sec. 184 (right of children born of marriages between white men and Indian women); Act of March 3, 1875, 18 Stat. at L. 420; U. S. C., Title 43, sec. 189, 43 U. S. C. A. sec. 189 (public lands), (Indians abandoning tribal relations). Cf. Oakes v. United States, (C.C.A. 8th Cir. 1909) 172 Fed. 305.

[64](1907) 205 U. S. 80, 27 Sup. Ct. 423, 51 L. Ed. 718.

[65]At p. 85.

adopting members was subject to some sort of review by the Department of the Interior. Such dicta would be entitled to greater weight if the court had not hastened to add that "it hardly is necessary to pass upon that point." It is fair, therefore, to conclude that on issues of the sort presented by the case of *United States ex rel. West v. Hitchcock,* involving the disposition of property by the secretary of the interior under special legislation authorizing such disposition, the secretary of the interior does have power to disregard a tribal decision on membership. Except in this situation, the tribal decision would seem to be final. This interpretation of the cases is confirmed by a recent opinion of the Interior Department.[66]

The written constitutions of tribes which have organized under the act of June 18, 1934, contain provisions on membership which vary considerably from tribe to tribe. Generally these constitutions provide that descendants of two parents, both of whom are members of the tribe, shall be deemed members of the tribe. With respect to the offspring of mixed marriages, constitutions differ. Some make the membership of such offspring depend upon whether his degree of Indian blood is more than one half or one quarter. Others make the membership of such offspring depend upon whether its parents maintain a residence on the reservation. Nearly all tribal constitutions provide for adoption through special action by the tribe, subject to review by the secretary of the interior. The general trend of the tribal enactments on membership is away from the older notion that rights of tribal membership run with Indian blood. no matter how dilute the stream. Instead it is recognized that membership in a tribe is a political relation rather than a racial attribute. Those who no longer take part in tribal affairs, who do not live upon the reservation, who marry non-Indians, may retain their claims upon tribal property, but most Indian tribes now deny such individuals the opportunity to claim a share of tribal assets for each child produced. The trend is toward making participation in tribal property correlative with the obligations that fall upon the members of the Indian community.

5. *Tribal Regulation of Inheritance.* The doctrine of tribal self-government implies that where Congress is silent the descent and distribution of Indian property will be governed by the customs or ordinances of the Indian tribes.

[66]See (1934) 55 I. D. 14, 39-40.

The leading case in which this proposition was tested is the case of *Jones v. Meehan*.[67] Land had been allotted to Chief Moose Dung. After his death, the chief's eldest son, Moose Dung the Younger, leased the land in 1891 for ten years, to two white men, the plaintiffs, on the assumption that he was, by the custom of his tribe, the sole heir to the property and entitled, in his own right, to dispose of it. Thereafter, in 1894, a second lease of the same land was executed in favor of another white man, the defendant. The secretary of the interior took the view that the earlier lease was invalid. The secretary of the interior approved the second lease, pursuant to a joint resolution of Congress specifically authorizing the approval of the second lease. Under the second lease, the secretary of the interior held, the rentals were to be divided among six descendants of the older Chief Moose Dung, and Moose Dung the Younger was to receive only a one-sixth share. Thus the Supreme Court was faced with a clear question: Did Moose Dung the Younger have the right, in 1891, to make a valid lease which neither the secretary of the interior nor Congress itself could thereafter annul? Faced with this question, the Court declared, per Gray, J.:

"The Department of the Interior appears to have assumed that, upon the death of Moose Dung the elder, in 1872, the title in his land descended by law to his heirs general, and not to his eldest son only.

"But the elder Chief Moose Dung being a member of an Indian tribe, whose tribal organization was still recognized by the government of the United States, the right of inheritance in his land, at the time of his death, was controlled by the laws, usages and customs of the tribe, and not by the law of the state of Minnesota, nor by any action of the secretary of the interior."[68]

"The title to the strip of land in controversy, having been granted by the United States to the elder Chief Moose Dung by the treaty itself, and having descended, upon his death, by the laws, customs and usages of the tribe, to his eldest son and successor as chief, Moose Dung the Younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or of Congress, or of the executive departments."[69]

The opinion of the Supreme Court in *Jones v. Meehan* cites a long series of cases in federal and state courts which likewise

[67](1899) 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 495.

[68]At. p. 29.

[69]At p. 32.

uphold the validity of tribal laws and customs of inheritance.[70] The upshot of the cases cited is summarized in the words of a New York court: "When Congress does not act no law runs on an Indian reservation save the Indian tribal law and custom."[71]

The decision of the Supreme Court in *Jones v. Meehan* is a clear refutation of the theory that in the absence of law plenary power over Indian affairs rests with the Interior Department. The case holds not only that power over inheritance, in the absence of Congressional legislation, rests with the Indian tribe, but that *Congress itself cannot disturb rights which have vested under tribal law and custom.*

The holding of the Supreme Court in *Jones v. Meehan* has never been questioned,[72] but the scope of that decision has been limited on allotted reservations by special statutes governing the probate of wills and the inheritance of real property.

The General Allotment Act of February 8, 1887[73] provides:

"The law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein or otherwise provided."

Under section 1 of the Act of June 25, 1910[74] the secretary of the interior is empowered to determine the legal heirs of Indian allottees, and it is declared that his decision thereon shall be "final and conclusive." The same act of June 25, 1910, gives the commissioner of Indian affairs and the secretary of the interior absolute power to approve or disapprove Indians' wills devising allotted land.

Under this legislation a large part of the tribal jurisdiction with respect to inheritance has been transferred, so far as the allotted reservations are concerned, to the state legislatures and to the Interior Department.

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[70]United States v. Shanks, (1870) 15 Minn. 369; Dole v. Irish (1848) 2 Barb. N. Y. 639; Hastings v. Farmer (1850) 4 N. Y. 293, 294; The Kansas Indians, (1866) 5 Wall. (U. S.) 737, 18 L. Ed. 667; Waupemanqua v. Aldrich (C.C.D. Ind. 1886) (28 Fed. 489); Brown v. Steele (1880) 23 Kan. 473; Richardville v. Thorp (C.C. Kan. 1886) 28 Fed. 52.

[71]Woodin v. Seeley, (1931) 141 Misc. Rep. 207, 252 N. Y. S. 818.

[72]Other cases which support or follow the decision in Jones v. Meehan are: Mackey v. Coxe, (1855) 18 How. (U.S.) 100, 315 L. Ed. 299; Gray v. Coffman, (C.C. Kan. 1874) 3 Dill. 393, 10 Fed. Cas. No. 5,714; Meeker v. Kaelin, (C.C. Wash. 1909) 173 Fed. 216; Y-Ta-Tah-Wah v. Rebock, (C.C. Ia. 1900) 105 Fed. 257; O'Brien v. Bugbee, (1891) 46 Kan. 1, 26 Pac. 428; Oklahoma Land Co. v. Thomas, (1912) 34 Okla. 681, 127 Pac. 8; Butler v. Wilson, (1915) 54 Okla. 229, 153 Pac. 823; George v. Pierce, (1914) 85 Misc. Rep. 105, 148 N. Y. S. 230.

[73]24 Stat. at L. 389; U. S. C., Title 25, sec. 348, 25 U. S. C. A. sec. 348.

[74]36 Stat. at L. 855; U. S. C., Title 25, sec. 372, 25 U. S. C. A. sec. 372.

Even on these reservations, however, wills of personal property are subject to the jurisdiction of the tribe. On reservations which have never been allotted, all inheritance of property remains subject to tribal jurisdiction, under the decision of the Supreme Court in *Jones v. Meehan.*[75]

6. *The Taxing Power of an Indian Tribe.* One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress is a proposition which has never been successfully disputed.

A landmark in this field is the case of *Buster and Jones v. Wright.*[76] The Creek Nation, one of the Five Civilized Tribes, had imposed a tax or license fee upon all persons, not citizens of the Creek Nation, who traded within the borders of that Nation. The Interior Department sought the advice of the attorney general as to the legality of this tax, and was advised that the tax was legal and that the Interior Department was under an implied duty to assist in its enforcement.[77] Thereupon the Interior Department promulgated appropriate regulations to assist the tribe in making collections of license fees. The plaintiffs in the case of *Buster and Jones v. Wright* were traders doing business on town sites within the boundaries of the Creek Nation, who sought to enjoin officers of the Creek Nation and of the Interior Department from closing down their business and ousting them for non-pay-

[75]See (1934) 55 I. D. 14, 43.

[76](C.C.A. 8th Cir. 1905) 135 Fed. 947, app. dism., (1906) 203 U. S. 599, 27 Sup. Ct. 777, 51 L. Ed. 334.

[77]"The treaties and laws of the United States make all persons, with a few specified exceptions, who are not citizens of an Indian nation or members of an Indian tribe, and are found within an Indian nation without permission, intruders there, and require their removal by the United States. This closes the whole matter, absolutely excludes all but the excepted classes, and fully authorizes these nations to absolutely exclude outsiders, or to permit their residence or business upon such terms as they may choose to impose, and it must be borne in mind that citizens of the United States have, as such, no more right or business to be there than they have in any foreign nation, and can lawfully be there at all only by Indian permission; and that their right to be or remain or carry on business there depends solely upon whether they have such permission.

"As to the power or duty of your department in the premises there can hardly be a doubt. Under the treaties of the United States with these Indian nations this government is under the most solemn obligation, and for which it has received ample consideration, to remove and keep removed from the territory of these tribes, all this class of intruders who are there without Indian permission. The performance of this obligation, as in other matters concerning the Indians and their affairs, has long been devolved upon the Department of the Interior. . . ." Trespassers on Indian Lands, (1900) 23 Op. Atty. Gen. 214, 217-218.

ment of taxes. On demurrer, the plaintiffs' bill was dismissed by the trial court. The decision of the trial court was affirmed by the court of appeals of the Indian Territory,[78] again by the circuit court of appeals for the eighth circuit,[79] and finally by the United States Supreme Court.[80] The learned opinion of Judge Sanborn in the circuit court of appeals illuminates the entire subject:

"The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it. Neither the authority nor the power of the United States to license its citizens to trade in the Creek Nation, with or without the consent of that tribe, is in issue in this case, because the complainants have no such licenses. The plenary power and lawful authority of the government of the United States by license, by treaty, or by act of Congress to take from the Creek Nation every vestige of its original or acquired governmental authority and power may be admitted, and for the purposes of this decision are here conceded. The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek tribe itself.

". . . It is said that the sale of these lots and the incorporation of cities and towns upon the sites in which the lots are found authorized by act of Congress to collect taxes for municipal purposes segregated the town sites and the lots sold from the territory of the Creek Nation, and deprived it of governmental jurisdiction over this property and over its occupants. But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal ordinances. Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners."[81]

[78] Buster and Jones v. Wright, (1904) 5 I. T. 404, 82 S. W. 855.

[79] (C.C.A. 8th Cir. 1905) 135 Fed. 947.

[80] (1906) 203 U. S. 599, 27 Sup. Ct. 777, 51 L. Ed. 334, dismissed without opinion.

[81] At pp. 949-952.

The case of *Buster and Jones v. Wright* dealt with what may be called a license or privilege tax, but the principles therein affirmed are equally applicable to a tax on property. Such a tax was upheld in *Morris v. Hitchcock.*[82] This case dealt with a tax levied by the Chickasaw Nation on cattle owned by non-citizens of that Nation and grazed on private land within the national boundaries. The opinion of the United States court of appeals for the District of Columbia declares:

"A government of the kind necessarily has the power to maintain its existence and effectiveness through the exercise of the usual power of taxation upon all property within its limits, save as may be restricted by its organic law. Any restriction in the organic law in respect of this ordinary power of taxation, and the property subject thereto, ought to appear by express provision or necessary implication. *Board Trustees v. Indiana,* 14 How. 268, 272; *Talbott v. Silver Bow Co.,* 139 U. S. 438, 448. Where the restriction upon this exercise of power by a recognized government, is claimed under the stipulations of a treaty with another, whether the former be dependent upon the latter or not, it would seem that its existence ought to appear beyond a reasonable doubt. We discover no such restriction in the clause of Article 7 of the Treaty of 1855, which excepts white persons from the recognition therein of the unrestricted right of self-government by the Chickasaw Nation, and its full jurisdiction over persons and property within its limits. The conditions of that exception may be fully met without going to the extreme of saying that it was also intended to prevent the exercise of the power to consent to the entry of non-citizens, or the taxation of property actually within the limits of that government and enjoying its benefits."[83]

The power to tax does not depend upon the power to remove and has been upheld where there was no power in the tribe to remove the taxpayer from the tribal jurisdiction.[84] Where, however, the tribe does have power to remove a person from its jurisdiction, it may impose conditions upon his remaining within tribal territory, including the condition of paying license fees. An opinion of the attorney general dated September 17, 1900, quoted with approval in *Morris v. Hitchcock,*[85] declares:

"Under the treaties with the Five Civilized Tribes of Indians,

[82](1903) 21 App. D. C. 565, aff'd (1904) 194 U. S. 374, 24 Sup. Ct. 712, 48 L. Ed. 1030.

[83]At. p. 593. Other authorities supporting the power of an Indian tribe to levy taxes or license fees are: Crabtree v. Madden, (C.C.A. 8th Cir. 1893) 54 Fed. 426; Maxey v. Wright, (1900) 3 Ind. T. 243, 54 S. W. 807, aff'd (C.C.A. 8th Cir. 1900) 105 Fed. 1003; (1884) 18 Op. Att. Gen. 34, 36; (1900) 23 Ops. Atty. Gen. 219, 220, 528.

[84]Buster and Jones v. Wright, (1904) 5 I. T. 404, 82 S. W. 855.

[85](1904) 194 U. S. 384, 391, 24 Sup. Ct. 712, 48 L. Ed. 1030.

no person not a citizen or member of a tribe, or belonging to the exempted classes, can be lawfully within the limits of the country occupied by these tribes without their permission, and they have the right to impose the terms upon which such permission will be granted."

It is therefore pertinent in analyzing the scope of tribal taxing powers, to inquire how far an Indian tribe is empowered to remove non-members from its reservation. This question is the more important today because statutes authorizing the commissioner of Indian affairs to remove "undesirable" persons from Indian country were repealed, at the urging of the present administration, in the interests of civil liberty.[86] Because of its peculiar jurisdictional status an Indian reservation is sometimes infested with white criminals or simple trespassers, and the problem of what effective legal action can be taken by a tribe to remove such persons from its reservation is a serious one.

The law as to the power of a tribe to exclude nonmembers from its territory is clearly stated in a series of authorities running back to the earliest days of the Republic. We find in the first volume of the Opinions of the Attorney General the following answer to a question raised by the secretary of war as to the right of the Seneca Nation to exclude trespassers from its lands:

"So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent."[87]

The present state of the law on the power to remove nonmembers is thus summarized in the solicitor's opinion of October 25, 1934, on "Powers of Indian Tribes:"

"Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty. But over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority."[88]

7. The Legal Status of Tribal Property. The proposition

[86]Act of May 21, 1934, 48 Stat. at L. 787 repealing U. S. C., Title 25, secs. 220, 221, 222, and related statutory provisions.

[87](1821) 1 Ops. Atty. Gen. 303.

[88](1934) 55 I. D. 14, 50, citing Morris v. Hitchcock, (1904) 194 U. S. 384, 24 Sup. Ct. 712, 48 L. Ed. 1030, and other cases.

that tribal property belongs to the Indian tribes is so plain and self-evident that it would not be worth discussion but for the fact that Congress and the executive occasionally have treated Indian tribal property as if it were a part of the public domain of the federal government. Thus Congress has provided for the issuance of mineral leases by the secretary of the interior upon unallotted tribal lands, in nine specified states,[89] for the sale of timber on tribal lands by the secretary of the interior,[90] and for the alienation of tribal land to individual Indians,[91] all without reference to the wishes of the tribe. When members of the Kiowa, Comanche and Apache Tribes attempted to stop the process of allotting the tribal domain as an unconstitutional infringement of tribal ownership rights guaranteed by treaty, the Supreme Court dismissed the suit on the ground that Congress had plenary power to manage Indian tribal property for the benefit of the Indians, and that the decision of Congress as to what was beneficial for the Indians would not be overthrown.[92]

Granted, however, that Congress has a very broad power to manage tribal property, a power even broader, apparently than its power over the property of individual Indians,[93] there remains the important question: Where Congress has not acted to divest the tribe of its powers, what powers may a tribe exercise over tribal property?

This question has become increasingly important as the tendency of Congress to disregard the Indian tribes in managing and disposing of tribal property has been abandoned during the past six years. It is noteworthy that each of the three principal statutes, above cited, authorizing the secretary of the interior to dispose of Indian tribal property without reference to the wishes of the Indians, has been modified within the past six years. The power of the secretary to allot tribal lands was revoked by section 1 of the Act of June 18, 1934[94] as to all tribes not excluded

[89]Section 26 of the Act of June 30, 1919; 41 Stat. at L. 31; 25 U. S. C., sec. 399, 25 U. S. C. A. sec. 399.

[90]Section 7 of the Act of June 25, 1910; 36 Stat. at L. 857; 25 U. S. C., sec. 407, 25 U. S. C. A. sec. 407.

[91]General Allotment Act of 1887; 24 Stat. at L. 388, 25 U. S. C., sec. 331-334, 339-341, 342, 348, 349, 25 U. S. C. A. secs. 331-334, 339-341, 342, 348, 349.

[92]Lone Wolf v. Hitchcock, (1903) 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299.

[93]See Choate v. Trapp, (1912) 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941.

[94]48 Stat. at L. 984, 25 U. S. C., Title 25, sec. 461, 25 U. S. C. A. sec. 461.

from that act. All tribes enjoying the advantages of that act are empowered to adopt constitutions which will

"prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe."[95]

Even tribes not under the Act of June 18, 1934, are protected, with respect to mineral leases, by the Act of May 11, 1938, which supersedes the earlier law, and provides that mineral leases on tribal land may be issued only

"by authority of the tribal council or other authorized spokesmen for such Indians."[96]

Equally significant is the fact that during the past three sessions of Congress all bills attempting to dispose of tribal land without the consent of the tribe were defeated.[97]

Recognizing, then, that Congress no longer seeks to prevent the Indian tribes from acting with respect to their tribal property, the question of what a tribe may do with tribal property has a practical as well as a theoretical importance.

The case of *Cherokee Nation v. Journeycake*[98] is perhaps the leading case which analyzes the respective rights of the Indian tribe and the individual member in tribal property. The case arose out of an agreement between the Cherokee Nation and the Delawares under which the Delawares were admitted to membership and guaranteed equal rights with other citizens of the Cherokee Nation. Later the Cherokee National Council enacted a discriminatory bill, over the veto of Principal Chief Bushyhead, which allocated proceeds of tribal grazing leases to native-born Cherokees but not to those of Delaware origin. The controversy over the claim of the Delawares to equal participation in Cherokee funds and lands was referred by Congress to the Court of Claims, which upheld the Delaware claim. This decision was affirmed by the Supreme Court. The opinion of Brewer, J., quoted with approval the opinion of the Court of Claims to the effect that "powers of absolute ownership" were "lodged in the Cherokee government," declared that individual members of the tribe held

[95]Act of June 18, 1834, sec. 16; 48 Stat. at L. 986, U. S. C., Title 25, sec. 476, 25 U. S. C. A. sec. 476.

[96]The areas excepted from this protection by sec. 6 of the act of May 11, 1938 (52 Stat. at L. 348, U. S. C., Title 25, sec. 396f, 25 U. S. C. A. sec. 396f) are covered by separate legislation.

[97]Thus, for example, various bills which attempted to transfer certain tribal lands of the Pyramid Lake Tribe to non-Indians without tribal consent failed of passage. (S. 3908, H.R. 11571, 74th Congress, 2d sess.; S. 840, 75th Congress, 1st sess.)

[98](1894) 155 U. S. 196, 15 Sup. Ct. 39 L. Ed. 120.

interests "limited to a mere occupancy of the tracts set apart for homes, with the right to free use in common of the unoccupied portion of the reserve, and a right to share in any future allotment," and concluded, upon the basis of Chief Bushyhead's veto message, that the Cherokee Nation had granted to its adopted citizens an equity in tribal property of which, under the Cherokee Constitution, they could not be deprived.[99]

Except for such rights as are thus conferred upon individual membership, ownership of tribal property, legal or equitable, rests in the tribe as an entity, rather than in the individual members.[100]

This analysis of tribal property was confirmed by the Supreme Court in the case of *Sizemore v. Brady*.[101] In that case the Court declared, per Van Devanter, J.:

". . . lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common."[102]

Likewise, in the case of *Franklin v. Lynch*,[103] the Supreme Court declared:

"As the tribe could not sell, neither could the individual members, for they had neither an undivided interest in the tribal land nor vendible interest in any particular tract."

In conformity with the foregoing analysis of tribal property, it has been held that title to Pueblo lands lies with the Pueblo and not with its members,[104] that the assignment of tribal land to individual Indians for private occupancy does not deprive the tribe itself of the right to make disposition of minerals on such land,[105] that tribal property of the Cherokee Nation, under the provisions of the Cherokee constitution, might be used for public purposes, but could not be diverted to a favored class through per capita payments.[106]

Summarizing the cases on the subject, an opinion of the solicitor of the Interior Department declares:

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[99]At pp. 211, 215, 217.

[100](C.C.A. 8th Cir. 1909) 168 Fed. 221, at pp. 222-223, citing: Stephens v. Cherokee Nation, (1899) 174 U. S. 445, 488, 19 Sup. Ct. 722, 43 L. Ed. 1041; Cherokee Nation v. Hitchcock, (1902) 187 U. S. 294, 23 Sup. Ct. 115, 47 L. Ed. 183; Lone Wolf v. Hitchcock, (1903) 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299; Wallace v. Adams, (C.C.A. 8th Cir. 1906) 143 Fed. 716, 74 C. C. A. 540; Ligon v. Johnston, (C.C.A. 8th Cir. 1908) 164 Fed. 670.

[101](1914) 235 U. S. 441, 35 Sup. Ct. 135, 59 L. Ed. 308.

[102]At p. 446.

[103](1914) 233 U. S. 269, 271, 34 Sup. Ct. 505, 58 L. Ed. 954.

[104]United States v. Lucero, (1869) 1 N. M. 422.

[105]Reservation Gas Company v. Snyder, (1914) 88 Misc. Rep. 209, 150 N. Y. S. 216; Application of Parker, (1929) 227 App. Div. 107, 237 N. Y. S. 134.

[106]Whitmire, Trustee, v. Cherokee Nation, (1895) 30 Ct. Cls. 138.

"The powers of an Indian tribe over tribal property are no less absolute than the powers of any landowner, save as restricted by general acts of Congress restricting the alienation or leasing of tribal property,[107] and particular acts of Congress designed to control the disposition of particular funds or lands."[108]

Tribal power over the *disposition* of tribal property is limited by Congressional legislation in the following matters:

(1) The leasing of tribal lands by the tribe is subject to approval or disapproval by the secretary of the Interior or his authorized representative,[109] except where the tribe has been incorporated under a charter which provides for the termination of this supervisory power.

(2) Tribal land may not be sold, mortgaged or conveyed,[110] except by way of exchange for lands of equal value on reservations under the act of June 18, 1934.[111]

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[107]Citing U. S. C., Title 25, sec. 177, 25 U. S. C. A. sec. 177. See note 110 infra. This statement is strongly confirmed by the decisions of the Supreme Court in United States v. Shoshone Tribe, (1938) 304 U. S. 111, and United States v. Klamath Indians, (1938) 304 U. S. 119, which dealt a deathblow to the theory that Indians have a "mere right of occupancy" amounting to a tenancy at will, in reservation lands. These cases held that where lands were taken from Indian tribes in violation of laws and treaties the Indians were entitled, under appropriate jurisdictional acts, to recover not only the value of the land surface but the value of timber and minerals as well. "For all practical purposes," the Court declared, in the Shoshone Case, "the tribe owned the land." (at p. 117)

[108](1934) 55 I. D. 14, 50.

[109]U. S. C., Title 25, secs. 397, 398, 402, 25 U. S. C. A. secs. 397, 398, 402.

[110]U. S. C., Title 25, sec. 177, 25 U. S. C. A. sec. 177 provides:

"Purchases or grants of lands from Indians. No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . ."

The broad language used in this statute has been restricted in judicial interpretation to actual conveyances of land or interests in land. Thus the courts have held that a tribe may issue grazing permits on tribal land without specific statutory authorization, on the theory that the provision in U. S. C., Title 25, sec. 179, 25 U. S. C. A. sec. 179, imposing a penalty upon persons driving stock to range upon Indian lands, without the consent of the Indian tribe, in effect recognizes the right of the tribe to permit the use of its lands for grazing purposes upon payment of a consideration. United States v. Hunter, (1885) 4 Mackey, (D.C.) 531; Kirby v. United States, (C.C.A. 9th Cir. 1921) 273 Fed. 391, (aff'd (1922) 260 U. S. 423, 23 Sup. Ct. 144, 67 L. Ed. 329). Similarly, U. S. C., Title 25, section 80, imposing a penalty upon persons settling on Indian lands, has been judicially interpreted as implying that an Indian tribe has power to permit such settlement upon such conditions as it may prescribe. See Morris v. Hitchcock, (1904) 194 U. S. 384, 24 Sup. Ct. 712, 48 L. Ed. 1030; Maxey v. Wright, (1900) 3 Ind. T. 243, 54 S. W. 807, (aff'd (C.C.A. 8th Cir. 1900) 105 Fed. 1003); Buster and Jones v. Wright (C.C.A. 8th Cir. 1905) 135 Fed. 947, app. dism. 203 U. S. 599, 27 Sup. Ct. 777, 51 L. Ed. 334.

[111]Sec. 4, (1906) (48 Stat. at L. 985, 986; U.S.C., Title 25, sec. 464, 25 U.S.C.A. sec. 464).

(3) Tribal funds in the Treasury of the United States may not be expended by the tribe without appropriation by Congress.[112] This limitation does not apply to tribal funds in the treasury of the tribe, which may be expended by tribal governing bodies without specific authorization by an act of Congress.

(4) Tribal funds which have been appropriated for certain purposes by act of Congress, or which are available in accordance with permanent legislation for expenditure by the secretary of the interior for certain designated purposes[113] are thereby taken outside the control of the tribe, unless the tribe is organized under section 16 of the Act of June 18, 1934. Tribes so organized, having received by statute the power "to prevent the . . . disposition . . . of . . . tribal assets without the consent of the tribe,"[114] are in a position to prevent the expenditure of tribal funds by administrative officials. An appropriation act, unless it contains specific language to the contrary, authorizes but does not compel an expenditure. The administrative officer authorized to expend funds must conform to all existing legislation outside of the appropriation act. If he cannot legally spend the money appropriated, the money remains in the United States Treasury and he has not violated any law. So, if Indian tribal funds are appropriated by Congress for a designated purpose, e.g., pay of tribal officers, and the tribe forbids such use of its tribal funds, the administrative officials cannot legally expend the funds. Presumably an attempt to expend such tribal funds without tribal consent could be blocked by injunction proceedings. Whether or not injunction proceedings are brought, the comptroller general might assess liability for improper payments for expenditures of tribal funds not authorized by the tribe. Failing any such relief, the tribe might resort to suit against the guilty officers, or, under a proper jurisdictional bill, suit against the United States.

(5) Contracts affecting tribal resources may not be made except with the approval of the commissioner and the secretary of the interior,[115] or pursuant to a tribal constitution or charter under the Act of June 18, 1934, and supplementary legislation.

It remains to be added that with the incorporation of Indian tribes, tribal property becomes corporate property. Although no case has yet passed definitely upon the question, it would seem

[112]U. S. Code, Title 25, sec. 123.
[113]See preceding footnote.
[114]Act of June 18, 1934, sec. 16.
[115]U. S. C., title 25, secs. 81, 85, 25 U. S. C. A. secs. 81, 85.

that since a corporation is held to be a "person" within the meaning of the fifth amendment, and entitled as such to protection against deprivation of property without due process of law, the property of an incorporated Indian tribe is protected not only against arbitrary administrative action but even against arbitrary congressional action. The holding of the United States Supreme Court in the case of *Choate v. Trapp*[116] would then be applicable to the funds and to the unallotted land of an Indian corporation, as well as to the property of individual allottees. A serious constitutional question would, therefore, be presented if Congress should enact legislation depriving an incorporated Indian tribe of property, real or personal, without the consent of the tribe, (except for public use and then only upon payment of just compensation).

8. *Indian Domestic Relations.* If the doctrine of Indian self-government laid down by Chief Justice Marshall is sound, the domestic relations obtaining among tribal members remain subject to tribal law and custom until Congress otherwise provides. The case of *United States v. Quiver,*[117] provided a critical test of the doctrine of *Worcester v. Georgia,* then eighty-three years old.

The case arose through a prosecution for adultery in the United States district court for South Dakota. Both of the individuals involved were Sioux Indians and the offense was alleged to have been committed on one of the Sioux reservations.

The Department of Justice authorized prosecution on the theory that Congress, by section 3 of the Act of March 3, 1887,[118] had terminated the original tribal control over Indian domestic relations.

The question was: Did this statute, which applied to all areas within the exclusive jurisdiction of Congress, apply to the conduct of Indians on an Indian Reservation? The Supreme Court held that it did not. The analysis of the subject by Mr. Justice Van Devanter is so illuminating, not only on the immediate question of jurisdiction over adultery, but on the broader question of the civil jurisdiction of an Indian tribe, that it is worth quoting:

"At an early period it became the settled policy of Congress

[116](1912) 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941, the Supreme Court held unconstitutional an act of Congress which modified earlier legislation protecting Indian lands from state taxation during a fixed period. The case is discussed at pages 197-199, infra.

[117](1916) 241 U. S. 602, 36 Sup. Ct. 699, 60 L. Ed. 1196.

[118]That section provides: "That whoever commits adultery shall be punished by imprisonment in the penitentiary not exceeding three years; . . ." (24 Stat. at L. 635, U. S. C., Title 18, sec. 516, 18 U. S. C. A. sec. 516.)

to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws. Thus the Indian Intercourse Acts of May 19, 1796, ch. 30, 1 Stat. at L. 469, and of March, 1802, ch. 13, 2 Stat. at L. 139, provided for the punishment of various offenses by white persons against Indians and by Indians against white persons, but left untouched those by Indians against each other; and the act of June 30, 1834, ch. 161, sec. 25, 4 Stat. at L. 729, 733, while providing that "so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country," qualified its action by saying, "the same shall not extend to crimes committed by one Indian against the person or property of another Indian." That provision with its qualification was later carried into the Revised Statutes as Secs. 2145 and 2146. This was the situation when this court, in *Ex parte Crow Dog,* 109 U. S. 556, held that the murder of an Indian by another Indian on an Indian reservation was not punishable under the laws of the United States and could be dealt with only according to the laws of the tribe. The first change came when, by the act of March 3, 1885, ch. 341, sec. 9, 23 Stat. at L. 362, 385, now sec. 328 of the Penal Code, Congress provided for the punishment of murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, and larceny when committed by one Indian against the person or property of another Indian. In other respects the policy remained as before. . . .

"We have now referred to all the statutes. There is none dealing with bigamy, polygamy, incest, adultery, or fornication, which in terms refers to Indians, these matters always having been left to the tribal customs and laws and to such preventive and corrective measures as reasonably could be taken by the administrative officers."[119]

It is clear, then, that in the absence of federal legislation, the domestic relations of members of an Indian tribe are subject to the unwritten or written laws of the tribe. Federal legislation on the subject of Indian domestic relations covers only a few particulars. There is a statute which provides that the issue of Indian custom marriage shall in all cases be deemed legitimate for purposes of inheritance of allotments.[120] Rape, including statutory rape, is made a federal offense by act of Congress.[121] Guardians appointed by Indian tribal councils are, by another special act

[119]At pp. 603-605.

[120]U. S. C., Title 25, sec. 371, 25 U. S. C. A. sec. 371.

[121]U. S. C., Title 18, sec. 548, 18 U. S. C. A. sec. 548.

of Congress, forbidden to receive federal moneys due to orphaned or incompetent Indians.[122]

In all other respects Congress has left the field vacant, and the jurisdiction of the tribe is undisputed.

The validity of marriages and divorces consummated in accordance with tribal law or custom is recognized in state and federal courts.[123]

Marriages by Indian custom have been recognized as valid, even in those cases where Indian custom sanctioned polygamy. As was said in *Kobogum v. Jackson Iron Co.*:[124]

"The testimony now in this case shows what, as matter of history, we are probably bound to know judicially, that among these Indians polygamous marriages have always been recognized as valid, and have never been confounded with such promiscuous or informal temporary intercourse as is not reckoned as marriage. While most civilized nations in our day very wisely discard polygamy, and it is not probably lawful anywhere among English-speaking nations, yet it is a recognized and valid institution among many nations, and in no way universally unlawful. We must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid which by Indian usage are so regarded. There is no middle ground which can be taken, so long as our own laws are not binding on the tribes. They did not occupy their territory by our grace and permission, but by a right beyond our control. They were placed by the Constitution of the United States beyond our jurisdiction, and we had no more right to control their domestic usages than those of Turkey or India.

"We have here marriages had between members of an Indian tribe in tribal relations, and unquestionably good by the Indian rules. The parties were not subject in those relations to the laws of Michigan, and there was no other law interfering with the full jurisdiction of the tribe over personal relations. We cannot inter-

[122]U. S. C., Title 25, sec. 159, 25 U. S. C. A. sec. 159.

[123]Carney v. Chapman, (1918) 247 U. S. 102, 38 Sup. Ct. 449, 62 L. Ed. 1005; Boyer v. Dively, (1875) 58 Mo. 510; Johnson v. Dunlap, (1918) 68 Okla. 216, 173 Pac. 359; Cyr v. Walker, (1911) 29 Okla. 281, 116 Pac. 931; Hallowell v. Commons, (C.C.A. 8th Cir. 1914) 210 Fed. 793; Earl v. Godley, (1890) 42 Minn. 361, 44 N. W. 254, 18 A. S. R. 517, 7 L. R. A. 125; Ortley v. Ross, (1907) 78 Neb. 339, 110 N. W. 1108; People ex rel. La Forte v. Rubin, (1905) 113 App. Div. 584, 98 N. Y. S. 787; Butler v. Wilson, (1915) 54 Okla. 229, 153 Pac. 823; Proctor v. Foster, (1924) 107 Okla. 95, 230 Pac. 753; Davis v. Reeder, (1924) 102 Okla. 106, 226 Pac. 880; Pompey v. King, (1923) 101 Okla. 253, 225 Pac. 175; Buck v. Branson, (1912) 34 Okla. 807, 127 Pac. 436; Johnson v. Johnson, (1860) 30 Mo. 72; Unussee v. McKinney, (1928) 133 Okla. 40, 270 Pac. 1096; and cf. Connolly v. Woolrich (1867) 11 Lower Can. Jur. 197.

[124](1889) 76 Mich. 498, 43 N. W. 602.

fere with the validity of such marriages without subjecting them to rules of law which never bound them."[125]

The jurisdiction of a tribal court over divorce actions has been recognized by federal and state courts.[126]

The basis of tribal jurisdiction over divorce was set forth with lucidity in the case of *Wall v. Williamson*:[127]

"It is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror."

The fact that Indians may obtain marriage licenses from state officials does not deprive the tribe of jurisdiction to issue a divorce where the parties are properly before a tribal court. In this respect Indians are in the same position as persons who, after marrying under the law of one state, may be divorced under the laws of another state or of a foreign nation.

It is, however, a matter of state law whether state courts will recognize the validity of such divorces. In the absence of reported decisions on this point it is not possible to say with any certainty how states are likely to treat such tribal divorces in cases that come up in state courts. So far as the federal government is concerned, the validity of such divorces is conceded. The current Law and Order Regulations of the Indian Service, approved by the secretary of the interior on November 27, 1935,[128] recognize the validity of Indian custom marriage and divorce and leave it to the governing authorities of each tribe to define what shall constitute such marriage and divorce.[129]

9. *The Municipal Status of Indian Tribes.* The question of whether an Indian tribe is a mob or a municipality was presented by the case of *Turner v. United States.*[130] The plaintiffs were white men, who, by procedures of questionable legality, had secured a lease to approximately 400 square miles of Creek tribal land. When they proceeded to fence the land, the tribal treasurer and many other Indians of the vicinity rose in protest and destroyed sixty miles of fence, which was as much as the plaintiffs had built. Congress thereafter enacted a statute authorizing the court of claims to hear the plaintiffs' claim against the Creek

[125]At pp. 507-509. See, to the same effect, State v. McKenney, (1883) 18 Nev. 182, 200, 2 Pac. 171.

[126]Raymond v. Raymond, (C.C.A. 8th Cir. 1897) 83 Fed. 721; (1888) 19 Ops. Atty. Gen. 109.

[127](1845) 8 Ala. 48, 51.

[128]See (1935) 55 I. D. 401.

[129](1935) 55 I. D. 407.

[130](1916) 51 Ct. Cl. 125, aff'd (1919) 248 U. S. 354, 39 Sup. Ct. 109, 63 L. Ed. 291.

Nation. The court of claims finally dismissed the plaintiffs' suit, declaring:

"Plaintiff's petition avers that the damage was inflicted by a mob of Indians of the Creek or Muskogee Nation or Tribe; and if that be true the Creek Nation is not to be held responsible for the mob's action. It can be said of the Creek Nation, as was said of the Cherokee Nation, that it has 'many of the rights and privileges of an independent people. They have their own constitution and laws and power to administer their internal affairs. They are recognized as a distinct political community, and treaties have been made with them in that capacity.' *Delaware Indians v. Cherokee Nation,* 193 U. S. 127, 144. They are not sovereign to the extent that the federal or state governments are sovereign, but this suit is predicated upon the assumption that their laws are valid enactments, and it recognizes the separate existence of the Creek Nation. When, therefore, the effort is made to hold them responsible as a nation for the illegal action of a mob we must apply the rule of law applicable to established governments under similar conditions. It is a familiar rule that in the absence of a statute declaring a liability therefor neither the sovereign nor the governmental subdivisions, such as counties or municipalities, are responsible to the party injured in his person or estate by mob violence."[131]

The decision of the court of claims; affirmed by the Supreme Court, clearly establishes that an Indian tribe is not a mere collection of individuals, and that the action of a mob, even though it should include all the members of a municipality, is not the action of the municipality.

In the *Turner Case* the question was whether the tribe was liable for acts of individuals. The converse question, whether an individual is liable for the debts of the tribe was raised in the case of *Parks v. Ross.*[132] This was a case that arose out of the forced migration of the Cherokee Indians, in 1838, from Georgia to what is now Oklahoma. John Ross, the Principal Chief of the Cherokee Nation, was authorized to contract for the hire of wagons to transport the Cherokee Indians and as much of their belongings as they had managed to save from the whites who had overrun their lands. One of the wagon-owners who entered into such a contract later brought suit against John Ross to recover extra compensation

[131]At pp. 152, 153, citing: Louisiana v. Major, (1883) 109 U. S. 285, 291, 3 Sup. Ct. 211, 27 L. Ed. 936; Hart v. Bridgeport, (C.C. Conn. 1876) 11 Fed. Cas. 6149; Gianfortone v. New Orleans, (C.C. E.D. La. 1894) 61 Fed. 64; City v. Abbagnato, (C.C.A. 5th Cir. 1894) 62 Fed. 240; Murdock Grate Co. v. Commonwealth, (1890) 152 Mass. 28, 31, 24 N. E. 854, 8 L. R. A. 399.

[132](1850) 11 How. (U.S.) 362, 13 L. Ed. 730.

to which he deemed himself entitled. The Supreme Court held that there was no basis for a claim against Principal Chief Ross, since he had entered into the contract on behalf of the tribe. The Court declared, per Grier, J.:

"Now, it is an established rule of law, that an agent who contracts in the name of his principal is not liable to a suit on such contract; much less a public officer, acting for his government. As regards him the rule is, that he is not responsible on any contract he may make in that capacity; and wherever his contract or engagement is connected with a subject fairly within the scope of his authority, it shall be intended to have been made officially, and in his public character, unless the contrary appears by satisfactory evidence of an absolute and unqualified engagement to be personally liable.

"The Cherokees are in many respects a foreign and independent nation. They are governed by their own laws and officers, chosen by themselves. And though in a state of pupilage, and under the guardianship of the United States, this government has delegated no power to the courts of this District to arrest the public representatives or agents of Indian nations, who may be casually within their local jurisdiction, and compel them to pay the debts of their nation, either to an individual of their own nation, or a citizen of the United States."[133]

The two cases of *Turner v. United States* and *Parks v. Ross* establish the position of an Indian tribe as a municipality, which is *not* responsible for the acts of its members and *is* responsible for the acts of its agents.

10. *The Form of Tribal Government.* One of the popular superstitions about Indians current among the non-Indian portion of our population is the notion that every Indian male over the age of thirty is either a chief or a big chief. This superstition is of great help to those Indians or pseudo-Indians who seek to earn a respectable living by selling snake oil to the sick, or by selling their fellow-tribesmen's land to land speculators or to the federal government, or by lecturing to women's clubs and Congressional committees, or by endowing needy lawyers with tribal business. It is generally very difficult to persuade those who have paid for or profited by such transactions with Indian "chiefs" that the Indian in question was not an officer of his tribe and had no tribal lands, tribal suits, or tribal wisdom to give away. It is, therefore, a matter of some concern to an Indian tribe that it should have the right to define a framework of official action and to insist that acts of individuals and groups that

[133]At p. 374.

do not fall within that framework are not acts of the tribe. This definition of a framework of government may take the form of a written constitution, or it may take the form of the British constitution, a disorderly mass of practices shading off into parliamentary procedure and court etiquette but including at its core the essential canons that we invoke, consciously or unconsciously, to decide whether the acts of certain individuals are governmental or non-governmental or anti-governmental.

The question of whether action done in the name of an Indian tribe is in truth tribal action has been before state and federal courts on many occasions, and in every case the courts have held that the definition of the form of tribal government is a matter for the decision of the Indians themselves.

Such a holding, for example, is found in the case of *Pueblo of Santa Rosa v. Fall.*[134] Certain attorneys claimed to represent an Indian pueblo and asserted ownership of a large area which the federal government considered public domain. The Indians themselves, apparently, denied the authority of the attorneys in question to put forward such a claim, but the attorneys justified their action on the basis of an alleged agreement with the "captain" of the pueblo. When the case came before the Supreme Court, that body found that according to the custom of the pueblo the "captain" would have no authority to act for the pueblo in a matter of this sort, and that such action without the approval of the pueblo council would be void. On the issue of fact the Court found:

"That Luis was without power to execute the papers in question, for lack of authority from the Indian council, in our opinion, is well established."[135]

The Supreme Court, however, reversed the decision of the lower court which had dismissed the suit on the merits, and held:

". . . the cause must be remanded to the court of first instance with directions to dismiss the bill on the ground that the suit was brought by counsel without authority, but without prejudice to the bringing of any other suit hereafter by and with the authority of the alleged Pueblo of Santa Rosa."[136]

The holding of the Supreme Court that the dismissal must be without prejudice to the pueblo is no less important than the dismissal itself. The same case had reached the Supreme Court on an earlier occasion, on a motion to dismiss the suit for lack

[134](1927) 273 U. S. 315, 47 Sup. Ct. 361, 71 L. Ed. 658.
[135]At pp. 319-320.

of capacity in the plaintiff pueblo, and on that issue the Supreme Court had upheld the pueblo, pointing to the fact that under special federal statutes it was a corporation, with the right to sue, and insisting that this right extended to the bringing of a suit against the secretary of the interior if that official violated the rights of the pueblo. The Supreme Court decisively rejected the argument of the government that a pueblo could not bring suit against the secretary of the interior.[137]

Thus, the two decisions of the Supreme Court in the case of the Pueblo of Santa Rosa supplement each other and constitute an important bulwark of Indian tribal rights. The Indian tribe has the right to defend its interests through legal process, but no official or pretended official or agent of the tribe can commit the tribe by his action unless that action falls within the framework of government established by the tribe itself.

Other decisions upholding the right of an Indian tribe to fix its own form of government are collected in a footnote.[138]

The power to define a form of government is one which has been exercised to the full, and it would be impossible within the compass of this paper to analyze the forms of government that different Indian communities have established for themselves. Indeed, it may be said that the constitutional history of the Indian tribes covers a longer period and a wider range of variation than the constitutional history of the colonies, the states and the United States. It was some time before the immigrant Columbus reached these shores, according to eminent historians, that the first federal constitution on the American Continent was drafted, the Gayaneshagowa, or Great Binding Law of the Five Nations (Iroquois).[139] It was in this constitution that Americans first established the democratic principles of initiative, recall, referendum, and equal suffrage.[140] In this constitution, also,

[136]At p. 321.

[137]Lane v. Pueblo of Santa Rosa, (1919) 249 U. S. 110, 39 Sup. Ct. 185, 63 L. Ed. 504.

[138]Cherokee Intermarriage Cases, (1906) 203 U. S. 76, 27 Sup. Ct. 29, 51 L. Ed. 96; Nofire v. United States, (1897) 164 U. S. 657, 17 Sup. Ct. 212, 41 L. Ed. 588; Rawlins and Presbey v. United States, (1888) 23 Ct. Cl. 106; Whitmire, Trustee, v. Cherokee Nation, (1895) 30 Ct. Cl. 138; Delaware Indians v. Cherokee Nation, (1903) 38 Ct. Cl. 234; (1849) 5 Ops. Atty. Gen. 79; (1855) 7 ibid. 142; (1888) 19 ibid. 179, 229; (1904) 25 ibid. 308; Mt. Pleasant v. Gansworth, (1934) 150 Misc. Rep. 584, 271 N. Y. S. 78; In re Darch, (1933) 147 Misc. Rep. 836, 265 N. Y. S. 86; Seneca Nation v. John, (1891) 27 Abb. N. C. 253, 16 N. Y. S. 40.

[139]A. C. Parker, The Constitution of the Five Nations (New York State Museum Bulletin, No. 184).

[140]Secs. 93, 94, 95, 96.

were set forth the ideal of the responsibility of governmental officials to the electorate, and the obligation of the present generation to future generations which we call the principle of conservation.[141]

Between the time of the adoption of the constitution of the Five Nations and the contemporaneous efforts of more than a hundred Indian tribes to reduce unwritten custom to writing, there is a fascinating history of political development that never has been pieced together. Students of Indian law know of the achievements of the Five Civilized Tribes in constitution-making by reason of occasional references in the decided cases to the Cherokee,[142] Creek,[143] and Choctaw[144] constitutions. What is not generally known is that many other Indian tribes have, from time to time, reduced their unwritten constitutional customs to writing. The writing of Indian constitutions under the Wheeler-Howard Act of June 18, 1934, is therefore no new thing in the legal history of this continent, and it is possible to hope that some of the political wisdom that has already stood the test of centuries of revolutionary change in Indian life is now being embodied in the constitutions of the hundred or so tribes which have been organized under that Act.[145]

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[141]Sec. 28.

[142]"The constitution of the Cherokees was a wonderful adaptation to the circumstances and conditions of the time, and to a civilization that was yet to come. It was framed and adopted by a people some of whom were still in the savage state, and the better portion of whom had just entered upon that stage of civilization which is characterized by industrial pursuits; and it was framed during a period of extraordinary turmoil and civil discord, when the greater part of the Cherokee people had just been driven by military force from their mountains and valleys in Georgia, and been brought by enforced immigration into the country of the Western Cherokees; when a condition of anarchy and civil war reigned in the territory—a condition which was to continue until the two branches of the nation should be united under the treaty of 1846 (27 Ct. Cl. 1); yet for more than half a century it has met the requirements of a race steadily advancing in prosperity and education and enlightenment so well that it has needed, so far as they are concerned, no material alteration or amendment, and deserves to be classed among the few great works of intelligent statesmanship which outlive their own time and continue through succeeding generations to assure the rights and guide the destinies of men. (Journeycake v. Cherokee Nation and United States, (1893) 28 Ct. Cl. 281, 317-318.)

[143]Ex parte Tiger, (1898) 2 Ind. Terr. 41, 27 S. W. 304.

[144]McCurtain v. Grady, (1896) 1 Ind. Terr. 107, 38 S. W. 65.

[145]As of January 15, 1939, ninety-seven Indian tribes had adopted constitutions under the Act of June 18, 1934 and its Alaska and Oklahoma extensions. No constitution thus far adopted by the Indians has been vetoed by the secretary of the interior.

II. Civil Liberties of Indians

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights. . . ."[146]

It would take us far beyond the scope of an already too long essay to define all those civil liberties which Indians share with their fellow-citizens of other races. We must be content here to trace the special forms which general civil liberties take with respect to the peculiar legal status of Indians.

The courts have pointed to two ways in which an Indian may meet injustices directed at him as an Indian. One way is to give up the status that subjects him to oppression: if he is a member of an oppressed tribe he may give up his citizenship in that tribe. The other way is to attack the oppressive measure itself.

The former alternative is based upon the individual right of expatriation. The latter is based upon the right of a racial minority to be immune from racial discrimination. This latter right our Indian population shares with every other minority group in the United States, and since all the minority groups that have reason to fear discriminatory legislation make up together a great majority of our population, the asserted right to be immune from racial discrimination lies at the heart of our democratic institutions.

1. *The Right of Expatriation.* Oppression against a racial minority is more terrible than most other forms of oppression, because there is no escape from one's race. The victim of economic oppression may be buoyed up in the struggle by the hope that he can improve his economic status. The victim of religious oppression may embrace the religion of his oppressors. The victim of political oppression may change his political affiliation. But the victim of racial persecution cannot change his race. For these victims there is no sanctuary and no escape.

If special legislation governing Indians refers to a racial group,[147] there is no way in which the individual Indian can avoid the impact of such laws. If, on the other hand, such laws refer only to persons having a certain social or political status, then, presumably, the oppressed Indian, by changing that status, can escape the force of such legislation. The issue whether the statutes

[146]The Declaration of Independence of the United States, in Congress, July 4, 1776.

[147]The thesis that our law governing Indians is "racial law" is defended by Heinrich Krieger, of the Notgemeinschaft der Deutschen Wissenschaft, in an article, Principles of the Indian Law and the Act of June 18, 1934, (1935) 3 Geo. Wash. L. Rev. 279 (announced as part of a dissertation on "American Racial Law").

that subject Indians to special treatment refer to a racial group or to a group defined in social and political terms is therefore a poignant issue not only to our 350,000 Indian citizens but as well to citizens of other races.

Some light on this issue we shall find in the constitution of the United States. The constitution expressly refers to Indians in two connections. Article 1, section 8, confers upon Congress the power to regulate commerce "with the Indian tribes." Article 1, section 2, declares that "Indians not taxed" shall not be counted as "free persons" in determining the representation of any state in Congress.[148] An Indian who is *not* a member of any tribe and who *does* pay taxes is, therefore, in the same class as a white man, so far as the constitution itself takes us.

Two other clauses of the constitution refer indirectly to Indians, and provide, by way of addition to the Congressional power "to regulate Commerce with . . . Indian tribes," two independent sources of Congressional power respecting Indian affairs. Article VI provides that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." At the time of the adoption of the constitution, the United States already had subsisting treaties with various Indian tribes, and continued to make such treaties for almost a century afterwards. Here, again, the constitution gives the federal government power to deal with Indian tribes, and indirectly with the members of those tribes, but no power with respect to Indians who are not affiliated with any tribe. Finally, Article IV, section 3, of the United States constitution provides that Congress "shall have Power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." This clause provides a base for a large part of the activities of the federal government with respect to Indian reservations and restricted Indian property, but again it gives no authority to govern *Indians as a racial group.*

In view of these constitutional provisions, we have the right to assume, in the absence of strong evidence to the contrary, that when Congress enacts legislation referring to Indians, it is referring to a group defined in political rather than racial terms, and that one who is an Indian, biologically speaking, may nevertheless be exempt from legislation affecting Indians.

This issue never has been squarely before the United States

[148]The phrase is repeated in the fourteenth amendment.

Supreme Court, but the viewpoint here put forward is confirmed by the only statement the Supreme Court has made upon the question, the dictum of the majority opinion in the *Dred Scott Case*:

". . . if an Indian should leave his nation or tribe and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people."[149]

There is one federal case which squarely raised the question whether Indians can avoid oppression at the hands of the federal government by renouncing their allegiance to their tribe and abandoning the reservation assigned to their use.

The case of *United States ex rel. Standing Bear v. Crook*[150] (C.C. Neb. 1879) arose out of an attempt of a band of Ponca Indians led by Chief Standing Bear to escape from a reservation in Indian Territory to which they had been removed by the Interior Department. After a few months on their new reservation they succeeded in escaping to Nebraska, where they took up a residence with friendly Omaha Indians. Brigadier General Crook, Commander of the Military Department of the Platte, was ordered to arrest Standing Bear and his followers and to return them to the Ponca reservation in Indian Territory. Standing Bear managed to secure attorneys, who sued out a writ of habeas corpus against General Crook. The principal ground of the writ was the claim that Standing Bear and his followers had renounced their membership in the Ponca tribe. Since they were no longer members of the tribe, it was argued that neither the Interior Department nor the United States Army could force these Indians to live upon the Ponca reservation.

The issue of fact was thus formulated by the Court, per Dundy, J.:

"It is claimed upon the one side, and denied upon the other, that the relators had withdrawn and severed, for all time, their connection with the tribe to which they belonged; and upon this point alone was there any testimony produced by either party hereto."[151]

On the issue of fact the Court found as follows:

"Standing Bear, the principal witness, states that out of five hundred and eighty-one Indians who went from the reservation in Dakota to the Indian Territory, one hundred and fifty-eight died within a year or so, and a great proportion of the others were sick and disabled, caused, in a great measure, no doubt, from

[149]Scott v. Sanford, (1856) 19 How. (U.S.) 393, 404, 15 L. Ed. 691.
[150](C.C. Neb. 1879) 5 Dill. 453, 25 Fed. Cas. no. 14,891.
[151]25 Fed. Cas. at p. 696.

change of climate; and to save himself and the survivors of his wasted family, and the feeble remnants of his little band of followers, he determined to leave the Indian Territory and return to his old home, where, to use his own language, 'he might live and die in peace, and be buried with his fathers.' He also states that he informed the agent of their final purpose to leave, never to return, and that he and his followers had finally, fully, and forever severed his and their connection with the Ponca tribe of Indians, and had resolved to disband as a tribe, or band, of Indians, and to cut loose from the government, go to work, become self-sustaining, and adopt the habits and customs of a higher civilization. To accomplish what would seem to be a desirable and laudable purpose, all who were able so to do went to work to earn a living. The Omaha Indians, who speak the same language, and with whom many of the Poncas have long continued to intermarry, gave them employment and ground to cultivate, so as to make them self-sustaining. And it was when at the Omaha reservation, and when thus employed, that they were arrested by order of the government, for the purpose of being taken back to the Indian Territory. They claim to be unable to see the justice, or reason, or wisdom, or necessity, of removing them by force from their own native plains and blood relations to a far-off country, in which they can see little but new-made graves opening for their reception. The land from which they fled in fear has no attractions for them. The love of home and native land was strong enough in the minds of these people to induce them to brave every peril to return and live and die where they had been reared. The bones of the dead son of Standing Bear were not to repose in the land they hoped to be leaving forever, but were carefully preserved and protected, and formed a part of what was to them a melancholy procession homeward. . . ."[152]

In view of the foregoing facts the Court reached the conclusion that the Indian relators

". . . did all they could to separate themselves from their tribe and to sever their tribal relations, for the purpose of becoming self-sustaining and living without support from the government. This being so, it presents the question as to whether or not an Indian can withdraw from his tribe, sever his tribal relation therewith, and terminate his allegiance thereto, for the purpose of making an independent living and adopting our own civilization.

"If Indian tribes are to be regarded and treated as separate but dependent nations, there can be no serious difficulty about the question. If they are not to be regarded and treated as separate, dependent nations, then no allegiance is owing from an individual Indian to his tribe, and he could, therefore, withdraw therefrom at any time. The question of expatriation has engaged the atten-

[152]25 Fed. Cas. at pp. 698, 699.

tion of our government from the time of its very foundation. Many heated discussions have been carried on between our own and foreign governments on this great question, until diplomacy has triumphantly secured the right to every person found within our jurisdiction. This right has always been claimed and admitted by our government, and it is now no longer an open question. It can make but little difference, then, whether we accord to the Indian tribes a national character or not, as in either case I think the individual possesses the clear and God-given right to withdraw from his tribe and forever live away from it, as though it had no further existence. If the right of expatriation was open to doubt in this country down to the year 1868, certainly since that time no sort of questions as to the right can now exist. On the 27th of July of that year congress passed an act, now appearing as section 1999 of the Revised Statutes, which declares that: 'Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and, whereas, in the recognition of this principle the government has freely received emigrants from all nations, and invested them with the rights of citizenship. . . . Therefore, any declaration, instruction, opinion, order or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic.'

"This declaration must forever settle the question until it is reopened by other legislation upon the same subject."

The federal court, in granting a writ of habeas corpus to Standing Bear against General Crook, established a precedent which many Indians, since Standing Bear, have followed, and which many administrators since General Crook have recognized. In the closing decades of the nineteenth century and down to very recent times, the trend of legislation and of administration with respect to Indian affairs was to decrease the area of tribal land and the authority of tribal councils, to multiply the restrictions upon the use that Indian tribes might make of their remaining property, and to break down tribal governments, tribal customs, and tribal social life. But always one door to freedom was left open: the individual Indian might accept an allotment of land, have the restrictions upon his land tenure removed, adopt "the habits of civilized life," abandon his tribal relations, attain citizenship, and thus achieve freedom from the oppression of Indian Bureau control. This was the way in which the Indian Bureau was to dissolve the Indian problem. The more intolerable the oppression of the Bureau upon the life of the tribe, the more successful was the Bureau in achieving its objective. The year's

quota of spiritual refugees from the tribal life was, on each reservation, the criterion of the Indian superintendent's success. It did not matter much that those who grasped at freedom through renunciation of tribal relations and federal property frequently reached their goal broken in spirit and swindled of their lands. To many Indians, as well as to many Indian administrators, this was an advance from serfdom to freedom, from barbarism to civilization.

It may be noted, in passing, that so deeply rooted was the Indian yearning for freedom, and so thoroughly were the Indians drilled to conceive of freedom as the final result of abandoning tribal relations, that when the Wheeler-Howard Act of June 18, 1934, offered to Indian tribes a common road to freedom from Indian Bureau control, the Act was widely misunderstood by the Indians themselves. The idea of an Indian achieving freedom through the removal of property restrictions and the breaking of tribal relations was familiar. The idea of an entire Indian tribe achieving freedom in an organized way through the machinery of constitutions, corporate charters, tribal ordinances, and the transfer of federal authorities and services to tribal agencies, was new and strange. Tribal government seemed to many Indians to promise only a continuation of "rubber stamp" tribal business committees, hand-picked by local Indian Bureau employees, and shorn of all power except the power to surrender tribal assets.

Consequently, many of the tribes most anxious to achieve freedom from federal control, such as the New York Indians, the Sioux and Assiniboine of Fort Peck, the Navajos, and Klamaths, voted to exempt themselves from the bill that promised tribal self-government, while many other tribes that never had felt themselves greatly oppressed went ahead, under the Wheeler-Howard Act, to establish the machinery of self-government.

The right of expatriation established by the *Standing Bear Case* remains a significant human right, even where Indian tribes are actually moving in an organized way toward the ideal of freedom from Indian Bureau supervision. The right of expatriation is an answer not only to federal oppression, but to tribal oppression as well. It would be remarkable if the development of Indian self-government failed to give rise to dissatisfied individuals and minority groups who considered their tribal status a mis-

[153]25 Fed. Cas. at p. 699.

fortune. History shows that nations lose in strength when they seek to prevent such unwilling subjects from renouncing allegiance.

2. *Immunity From Racial Discrimination.* The right to be immune from racial discrimination is in part a constitutional right derived from the fifth, fourteenth and fifteenth amendments, in part a statutory right, and for the rest a moral right, implicit in the character of democratic government but not always protected by adequate legal machinery. In the first instance the struggle of the Indian to achieve legal equality with his white neighbors requires an attack upon unconstitutional discriminatory legislation. The second case calls for an attack on discriminatory administrative practices that are in conflict with existing law. The third situation calls for positive effort to secure appropriate legislation that will secure to the Indian equal treatment before the law.

The most explicit constitutional protection given to racial minorities is found in the provisions of the fifteenth amendment with respect to the right of franchise:

"Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude.

"Sec. 2. Congress shall have power to enforce this article by appropriate legislation."

Congress has given force to this constitutional amendment through a series of statutes which make it a crime to deprive any person of any civil rights "by reason of his color or race," and otherwise protect the elective franchise and civil rights of minority racial groups.[154]

The United States Supreme Court was called upon to enforce these constitutional and statutory guarantees in the case of *United States v. Reese,* [155] involving the denial of suffrage to Negroes. In this case the Supreme Court declared, per Waite, C. J.:

"If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race,

[154]Act of May 31, 1870, sec. 1 (16 Stat. at L. 140; R.S. sec. 2004, U.S.C., Title 8, sec. 31, 8 U.S.C.A. sec. 31); Act of March 4, 1909, secs. 19-20 (35 Stat. at L. 1092, R.S. secs. 5508, 5510, U.S.C., Title 18, secs. 51-53, 18 U.S.C.A. secs. 51-53).

[155](1875) 92 U. S. 214, 218, 23 L. Ed. 478.

color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.'"

Again, in the case of *Neal v. Delaware,* [156] the Supreme Court ruled that a provision of the Delaware constitution which restricted the right of suffrage to the white race had been rendered invalid by the passage of the fifteenth amendment. The Court declared, per Harlan, J.:

"Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race."

Under these decisions of the United States Supreme Court it would appear that statutes which deny the franchise either to Indians generally or to Indians of a certain class, where white men of that class would be permitted to vote, are unconstitutional. A ruling to this effect was issued by the solicitor of the interior department on January 26, 1938.[157] A similar opinion with respect to the clause in the constitution of the state of Washington disfranchising Indians has been rendered by the attorney general of that state.[158]

The state constitutions of Idaho,[159] New Mexico,[160] South Dakota,[161] and Washington[162] contain specific provisions excluding from the franchise Indians "not taxed," or Indians "maintaining tribal relations." These provisions are apparently still enforced in the states of Idaho and New Mexico. There can be little doubt that if the issue is properly raised in these states the federal courts will hold the provisions to be unconstitutional.

Apart from those states which by their election laws expressly discriminate against Indians there are several states which effectuate such discrimination indirectly. In Arizona, for example, the

[156](1880) 103 U. S. 370, 389, 26 L. Ed. 567.

[157]Opinion M-29596.

[158]"If an Indian has become a citizen of the United States, the state has no power to make his right to vote dependent upon the payment of taxes when no such requirement is made with respect to the members of any other race. Consequently the proviso to section 1, article 6, supra, is in conflict with the fifteenth amendment and therefore invalid unless it be given the construction above." (Per Attorney General W. V. Tanner, opinion rendered June 15, 1916.)

See also opinion of G. W. Hamilton, Attorney General of Washington, dated April 1, 1936 (opinion No. 4086).

[159]Idaho, Constitution article VI, section 3.

[160]New Mexico, Constitution article VII, section 1. See also New Mexico, Statutes, (1929) 41-210L; 1927 ch. 210, sec. 210.

[161]South Dakota, Compiled Laws (1929) sec. 92.

[162]Washington, constitution article VI, section 1.

constitution denies the franchise to "persons under guardianship,"[163] and the Arizona courts have held that Indians subject to federal jurisdiction are "under guardianship" and therefore disqualified from voting.[164] It is believed that the basic premise of this decision is erroneous. Subjection to federal jurisdiction does not make Indians persons "under guardianship." Although John Marshall spoke of the relation of the United States to an *Indian tribe* as similar to that of a guardian to a ward, and although this apt figure has often been applied, more or less metaphorically, to the relation of the federal government to individual Indians, the fact remains that Congress never has enacted a statute making Indians "wards of the government." Certainly no court has ever adjudicated the Indian race to be a race "under guardianship." Indeed it is hard to see how any court would have the right to put any class of American citizens under a special "guardianship." The claim of such a right would seriously threaten the liberty of any group which might sustain a special relation to the federal government, e.g., soldiers, relief workers, government employees, or beneficiaries of social security legislation. Towards all these groups the federal government may appear, in certain phases, as a Great White Father, but that is surely no sufficient basis for a denial of the franchise.

In Colorado, Utah, and perhaps other states legislation which does not in terms deny the right of franchise to Indians has been administered in a way to effect such discrimination. The problem of fighting such discrimination presents greater difficulties than those which are presented by openly discriminatory legislation. The Supreme Court, however, on several notable occasions has held unconstitutional election laws which, while innocent on their face, were interpreted and applied in a discriminatory manner.

Thus, in the case of *Guinn v. United States*,[165] the Supreme Court of the United States held unconstitutional a "grandfather clause" in the constitution of Oklahoma which, without expressly mentioning Negroes, had the effect of discriminating against them by denying the franchise to illiterates whose ancestors had not voted prior to 1868, while allowing other illiterates to vote.

The Indian thus has reason to hope that if other means of

[163]Article VII, sec. 2.

[164]Porter v. Hall, (1928) 34 Ariz. 308, 27 Pac. 411.

[165](1915) 238 U. S. 347, 35 Sup. Ct. 926, 59 L. Ed. 1340. See, to the same effect, Myers v. Anderson, (1915) 238 U. S. 368, 35 Sup. Ct. 932, 59 L. Ed. 1349, holding unconstitutional a "Grandfather Clause" in Maryland.

vindication of his right of franchise fail, the United States Supreme Court will, in the end, vindicate that right which, in a democracy, is the basis of all other rights.

In fields other than the exercise of the franchise, constitutional guaranties against racial discrimination are less clear. Those fields in which the Indian must rely upon enlightened legislation and public opinion rather than upon courts in the vindication of his rights are beyond the scope of this essay. It is fitting, however, in passing, to mention three significant victories that have been won for the cause of Indian rights in recent years, in the fields of legislation and administration.

On May 21, 1934, a dozen ancient laws which limited the freedom of speech of Indians, empowered the commissioner of Indian Affairs to remove from an Indian reservation persons whose presence he considered "detrimental," and sanctioned various measures of military control within Indian reservation boundaries, were repealed by Congress.[166]

Again, on November 27, 1935, the secretary of the interior revoked the regulations of the Indian Office, first promulgated in 1884 and slightly modified in 1904, which empowered the superintendent of an Indian reservation to act as judge, jury, prosecuting attorney, police officer and jailor. In place of this barbarous system a judicial system was established, based on the consent of the governed, and similar in general outline to the judicial systems prevailing in non-Indian municipalities. Under the new system defendants have a right to formal charges, jury trial, power to summon witnesses, and the privilege of bail.[167]

A third significant victory in the Indian's struggle for equality before the law was won on February 17, 1937, when efforts, hitherto successful, to exclude Indians and Indian lands from soil conservation benefit payments were stamped as unauthorized and unlawful by the solicitor of the department of agriculture.

There remain many fields in which the issue of discrimination has yet to be fought out,—e.g., social security benefits and educational opportunities. Perhaps the permanent problem of Indian liquor laws belongs in this category. But this is material that does not yet belong in a history of the defense of Indian rights in the federal courts.

[166]Act of May 21, 1934 (48 Stat. at L. 787), repealing sections 171, 172, 173, 186, 219, 220, 221, 222, 223, 224, 225, and 226 of Title 25 of the U. S. C.

[167](1935) 55 I. D. 401.

III. Property Rights of Indians

"There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But these few all recognize that he is not excepted from the protection guaranteed by the constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States."[168]

Indian property rights are of two types—rights of the tribe and rights of the individual Indian. Rights of the former type have been considered incidentally in our analysis of the legal status of tribal property. There remains the task of outlining the rights of individual Indians. In so far as these rights are distinctively Indian they involve two questions: (1) What are the rights of an individual member of an Indian tribe with respect to tribal property? (2) What are the rights of an individual Indian with respect to individual restricted property?

1. *The Right to Share in Tribal Property.* In the case of *Mason v. Sams,*[169] the plaintiffs, Indians of the Quinaielt Tribe, had been denied the right to utilize fishing sites on the Quinaielt Reservation. The defendant, the superintendent of the reservation, took the position that under Interior Department regulations "for the conservation and preservation of the salmon supply of the Quinaielt River" the commissioner of Indian affairs had made the right to fish in the Quinaielt River dependent upon the payment of certain license fees, and had assigned all available fishing sites to Indian licensees other than the plaintiffs. The plaintiffs, on the other hand, contended that such regulations were not authorized by any law and were in contravention of the treaty under which the lands of the Quinaielt Reservation had been reserved "for the use and occupation of the tribes and bands aforesaid . . . and set apart for their exclusive use." The language of this treaty is typical of that used in many other treaties, and the issue raised in this case is therefore of general application.

The plaintiff asked for an injunction against the enforcement of the regulations in question. The defendants moved to dismiss the suit on the ground that the commissioner of Indian affairs and the secretary of the interior were authorized to issue the regulations in question and were necessary parties, and that since they had not been named as party defendants the plaintiffs' suit could not be maintained. The defendant was unable to cite any specific authority for the regulations but relied upon the vague and gen-

[168]Choate v. Trapp, (1912) 224 U. S. 665, 677, 32 Sup. Ct. 565, 56 L. Ed. 941.

[169](D.C. Wash. 1925) 5 F. (2d) 255.

eral language of section 463 of the Revised Statutes[170] which provides:

"Section 2. *Duties of commissioner.* The commissioner of Indian affairs shall, under the direction of the secretary of the interior, and agreeably to such regulations as the president may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."

This statute was enacted to define the duties of the commissioner of Indian affairs. It did not create any substantive powers to govern Indians, who were at the time of its enactment actually as well as legally self-governing. The powers of the president, to which the powers of the commissioner were expressly subordinated by this statute, are elsewhere defined as limited to two subjects: "carrying into effect the various provisions of any act relating to Indian affairs and for the settlement of the accounts of Indian affairs."[171] This, then, was the alleged basis for the regulations upon which the defendant stood. The importance of the issue presented in this case is indicated by the number of other regulations of the Indian Service which have no other authority than the Act of 1832 cited.

The Court put the issue in these terms:

"The question for determination is whether, under the treaties and laws affecting Indians, Indian Tribes, and tribal rights, the commissioner of Indian affairs and secretary are vested with a discretion in this matter. If they are so vested, they are necessary parties and the bill must be dismissed. . . . However, if the commissioner and secretary are not so vested with the authority exercised by them in promulgating these regulations, the motion to dismiss should be denied. . . ."

In addressing itself to this question, the Court pointed out that the right to take fish in this stream was, under the treaty, "a right common to the members of the tribe," that "the fish in the waters of this stream do not belong to the state, nor to the United States; but to the Indians of this reservation," and concluded that, in the absence of any tribal agreement the commissioner of Indian affairs had no authority to promulgate the regulations in question.

The decision in *Mason v. Sams* thus stands as a milestone in the defense of Indian rights. From this decision two conclusions may be drawn: (1) that the individual Indian has a right to the

[170]Act of July 9, 1832, sec. 1 (4 Stat. at L. 564) as amended by Act of July 27, 1868, sec. 1 (15 Stat. at L. 228); U. S. C., Title 25, sec. 2, 25 U. S. C. A. sec. 2.

[171]Rev. Stat. 465; Act of June 30, 1834, sec. 17 (4 Stat. at L. 738); U. S. C., Title 25, sec. 9, 25 U. S. C. A. sec. 9.

use of a fair share of the assets of the tribe; and (2) that the Indian Bureau has no authority, in the absence of tribal agreement, to deprive any member of the tribe of the right to equal participation in tribal assets.

2. *Rights in Individual Restricted Property.* Despite popular impressions to the contrary, the individual Indian has the same right as any other citizen to make contracts, to acquire and dispose of property, and to sue and be sued in the state or federal courts.[172] The real problem of Indian property rights arises only in connection with restricted Indian property, and more particularly with respect to allotted lands.

The break-up of Indian tribal lands and funds into individual portions was a major imperative of Indian policy for more than a century. It was thought that this break-up was morally necessary in order to civilize the Indian. Consequently, while the tendency in white economic life was towards closer organization of business, of labor and of farmers, towards larger ranches and farm units, and towards the substitution of large scale timber, mining, and grazing operations for family-size operations, the opposite tendency was imposed upon Indian economic life. The break-up of tribal lands left in the hands of individual Indians pieces of land which, in most instances, the Indian could not profitably utilize, and the federal government then stepped back into the picture to administer the pieces. Under this system of property supervision Indians frequently complain that they are allowed no part in the management of their own property, and that in effect the government handles Indian property as it handles, let us say, a wild-game refuge—with the well-being of the occupants in mind but without conceding to said occupants any legal rights.

Occasionally this Indian complaint has reached the stage of litigation, and the courts have been asked to decide whether the Indian had any constitutional rights in what was said to be "his" restricted property. The most famous of such cases is that of *Choate v. Trapp.*[173] The issue raised in the case is stated in the opening words of Justice Lamar:

"The eight thousand plaintiffs in this case are members of the Choctaw and Chickasaw tribes. Each of them holds a patent to 320 acres of allotted land issued under the terms of the Curtis Act (June 28, 1898, 30 Stat. at L. 495, 507, c. 517), which con-

[172]See Brown, The Indian Problem and the Law, (1930) 39 Yale L. J. 307, 314, and cases cited.

[173](1912) 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941.

tained a provision 'that the land should be non-taxable' for a limited time. Before the expiration of that period the officers of the State of Oklahoma instituted proceedings with a view of assessing and collecting taxes on these lands lying within that State. The plaintiffs' application for an injunction was denied."

Here was a situation in which the plaintiff Indians had given up their right to share in tribal property in exchange for individual parcels of tax exempt land, and within two years after the completion of the transaction Congress had attempted to withdraw an essential part of the consideration.

The Supreme Court recognized "that the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute."[174] "But there is," the Court declared,

"a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law. . .[175]

"But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma.[176]

"The patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself. Under the provisions of the fifth amendment there was no more power to deprive him of the exemption than of any other right in the property. No statute would have been valid which reduced his fee to a life estate, or attempted to take from him ten acres, or fifty acres, or the timber growing on the land. After he accepted the patent the Indian could not be heard, either at law or in equity, to assert any claim to the common property. If he is bound, so is the tribe and the government when the patent was issued.[177]

"There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the constitution. His private rights are secured

[174]At p. 671.

[175]At. p. 671.

[176]At p. 673, citing: Kansas Indians, (1866) 5 Wall. (U.S.) 737, 756, 18 L. Ed. 667; United States v. Rickert, (1903) 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532.

[177]At pp. 673-674.

[178]Citing: In re Heff, (1905) 197 U. S. 488, 504, 25 Sup. Ct. 506, 29 L. Ed. 848; Cherokee Nation v. Hitchcock, (1902) 187 U. S. 294, 307, 23 Sup. Ct. 115, 47 L. Ed. 183; Jackson ex. dem. Smith v. Goodell, (1822) 20 Johns. (N.Y.) 188; Lowry v. Weaver, (C.C. Ind. 1846) 4 McLean 82, 15 Fed. Cas. No. 8584; Whirlwind v. Von der Ahe, (1896) 67 Mo. App. 628; Taylor v. Drew, (1860) 21 Ark. 485, 487.

and enforced to the same extent and in the same way as other residents or citizens of the United States.[178] His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe and subject to the guardianship of the United States as to his political and personal status. . . . The decree refusing to enjoin the assessment of taxes on the exempt lands of plaintiffs must therefore be reversed, and the case remanded for further proceedings not inconsistent with this opinion."[179]

The decision in *Choate v. Trapp* stands as a landmark in the history of judicial protection of Indian rights. What is important is not the right of tax-exemption which the decision confirmed. The Supreme Court had held, as far back as 1866, that tribal lands and restricted allotted lands are not subject to taxation, in the absence of express authorization by Congress.[180] The real significance of the decision in *Choate v. Trapp* was the holding that Congress itself could not authorize taxation of Indian lands after promising the Indians that the lands would be tax-exempt. To this day, Congress has never again enacted a statute that withdrew from Indian hands property rights lawfully vested, and every piece of proposed legislation that falls within this description is analyzed today in terms of the Court's opinion in that case.

VI. Conclusion

The defense of Indian rights in the federal courts is a significant part of the pageant of American liberty. Across the panorama of the years pass judges who were tolerant enough to appreciate the grievances of an oppressed people and courageous enough to vindicate rights that Presidents, cabinet officers, army generals and reservation superintendents had violated. Chief Justice Marshall, defending the rights of the Cherokee Nation which the hardened Indian fighter in the White House refused to enforce, Judge Dundy, issuing his writ of habeas corpus against General Crook, and the long procession of their fellow justices who have made Indian law—not the least of them Justices Grier, Sanborn, Lamar and Van Devanter—have played their part in the defense of American liberty. And across the decades, there march old Indian chiefs and warriors, forgotten criminals and peaceful victims of the white man's exploitation, each playing his part in the struggle to vindicate the human rights of a vanquished race.

[179]At pp. 678-79.
[180]The Kansas Indians, (1866) 5 Wall. (U.S.) 737, 18 L. Ed. 667.

The murderer, Crow Dog, and the leader of exiles, Standing Bear,—John Ross, the Principal Chief of the Cherokee Nation in its trek to Indian Territory across the Trail of Tears, the Quinaielt Indians who insisted upon their right to fish on their own Reservation, the Choctaws and Chickasaws who insisted that the United States fulfill its promise that their allotted lands be exempt from taxation—all are part of this pageant of American liberty. For our democracy entrusts the task of maintaining its most precious liberties to those who are despised and oppressed by their fellow men.